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No. 91-1815

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WESTBOROUGH MALL, INC., a Missouri Corporation,
GEORGE STAPLES, JR., and
WESTBOROUGH MALL ASSOCIATES,
a Missouri Limited Partnership,

Petitioners,

vs.

CITY OF CAPE GIRARDEAU, MISSOURI,
a Municipal Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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93

QUESTIONS PRESENTED

1. As left open by *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), whether a local government can be liable for a policymaker's unconstitutional conduct that is also illegal under local law?

2. Does the owner of private property have a right to a determination of whether constitutional rights have been deprived, even if the property owner cannot show that such deprivation caused actual injury?

3. Does an appellate court possess authority to affirm on grounds directly contradicted by a trial court's finding without holding that such finding was clearly erroneous?

LIST OF PARTIES

All parties are identified in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	I
List of Parties	II
Table of Authorities	V
Opinions Below	1
Jurisdiction	3
Constitutional Provisions and Statute Involved	3
Statement of the Case	4
The Basis of Federal Jurisdiction	6
Argument	7
I. The Eighth Circuit Erred When it Decided That the City of Cape Girardeau Cannot be Liable for its City Manager's Unconstitutional Conduct that was Illegal under Local Law.	8
II. The Eighth Circuit Erred by Holding a Deprivation of Constitutional Rights is Not Actionable Unless the Plaintiffs Can Show Proof of Actual Injury.	13
III. The Eighth Circuit Should Not Have Affirmed the District Court on Grounds Directly Contradicted by a District Court's Finding, Without Holding that Such Finding was Clearly Erroneous.	17
Conclusion	21

Page

Appendix A,
Opinion of Eighth Circuit in *Westborough I* 1a

Appendix B,
Opinion of Eighth Circuit in *Westborough II* 26a

Appendix C,
Opinion of Eighth Circuit in *Westborough III* 44a

Appendix D,
Opinion of District Court on remand from *Westborough III* 48a

Appendix E,
Opinion of Eighth Circuit in *Westborough IV* 55a

Appendix F,
Order denying rehearing in *Westborough IV* 63a

Appendix G,
Text of Constitutional Provisions and Statute Involved 64a

TABLE OF AUTHORITIES

Cases	Page
Adamson v. *Volkmer*, 680 F.Supp. 1191 (N.D. Ill. 1987)	9
Anderson v. *Bessemer City*, 470 U.S. 564 (1985)	17, 20
Anela v. *City of Wildwood*, 790 F.2d 1063 (3rd Cir. 1986), *cert. denied*, 479 U.S. 949 (1986)	9
Bateson v. *Geisse*, 857 F.2d 1300 (9th Cir. 1988)	9
Bell v. *Hood*, 327 U.S. 678 (1946)	14
Bigford v. *Taylor*, 834 F.2d 1213 (5th Cir. 1988), *cert. denied*, 488 U.S. 851 (1988)	8
Carey v. *Piphus*, 435 U.S. 247 (1978)	11, 13, 16
Chalmers v. *City of Los Angeles*, 762 F.2d 753 (9th Cir. 1985)	11
Dennison Mfg. Co. v. *Panduit Corp.*, 475 U.S. 809 (1986)	20
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	11
Gahey v. *Edwards*, 759 F.2d 337 (8th Cir. 1984)	15
Graham v. *Baughman*, 772 F.2d 441 (8th Cir. 1985)	15

Page

Hogue v. *Clinton*,
791 F.2d 1318 (8th Cir. 1986), *cert. denied*, 479 U.S. 1008 (1986) 15

Joiner v. *City of Ridgeland, Miss.*,
669 F.Supp. 1362 (S.D. Miss. 1987) 9

Kimball Laundry Co. v. *United States*,
338 U.S. 1 (1949) 14

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 11

Memphis Community School Dist. v. *Stachura*,
477 U.S. 299 (1986) 14

Monell v. *Department of Social Services*,
436 U.S. 658 (1978) 7

Monroe v. *Pape*,
365 U.S. 167 (1961) 7, 11, 12

O'Quinn v. *Manuel*,
773 F.2d 605 (5th Cir. 1985) 9

Owen v. *City of Independence*,
445 U.S. 622 (1980) 14

Parratt v. *Taylor*,
451 U.S. 527 (1981) 11, 12

Pembaur v. *City of Cincinnati*,
475 U.S. 469 (1986) 1, 7, 8, 9, 11, 12

Rogers v. *Kelly*,
866 F.2d 997 (8th Cir. 1989) 15

Turner v. *Upton County, Tex.*,
915 F.2d 133 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 788 (1991) 9

Page

Wetzel v. *Hoffman*,
928 F.2d 376 (11th Cir. 1991) 9

Williams v. *Butler*,
802 F.2d 296 (8th Cir. 1986), *vacated sub nom. City of Little Rock* v. *Williams*, 486 U.S. 931 (1988) 9

Yuba Natural Resources, Inc. v. *United States*,
821 F.2d 638 (Fed. Cir. 1987) 14

Procedural Rules

F.R. Civ. P. 52(a) 20

Treatise

S. Namod Civil Rights and Civil Liberties Litigation
(3d Ed.) 8

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Westborough Mall, Inc., George Staples, Jr. and Westborough Mall Associates (hereinafter "Westborough"), plaintiffs in the action below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This action was commenced over thirteen years ago by the filing of a petition on April 5, 1979 against the City of Cape

Girardeau (hereinafter "City"). After the City's petition for removal was granted, the City moved for summary judgment, which motion was granted by the trial court, holding in part, that official policy did not cause a constitutional deprivation. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 532 F.Supp. 284 (E.D. Mo. 1981). On November 12, 1982, the Eighth Circuit Court of Appeals unanimously reversed and remanded. *Westborough Mall, Inc.* v. *City of Cape of Girardeau*, 693 F.2d 733 (8th Cir. 1982) (*Westborough I*) (Appendix A). Certiorari was denied by this Court at 461 U.S. 945 (1983).

On remand, Westborough's claims against the City were submitted to a jury. On November 9, 1983, the jury found the issues in favor of the defendant; however, on appeal, the Eighth Circuit analyzed the instructions in light of the evidence of official policy and resulting damage to Westborough, and again unanimously reversed and remanded. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986) (*Westborough II*) (Appendix B). Certiorari was denied by this Court at 480 U.S. 918 (1987).

On April 20, 1989, after a trial to the court, the lower court entered judgment finding in favor of the defendant City on the basis that official policy did not cause a deprivation of Westborough's constitutional rights. *Westborough Mall, Inc.* v. *City of Cape Girardeau, Missouri*, 710 F.Supp. 1278 (E.D. Mo. 1989). On appeal, the Eighth Circuit chose to forestall reviewing the lower court's judgment on liability and, instead, remanded the case to the trial court "to decide whether and to what extent Westborough suffered damages as a result of the city manager's actions." *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 910 F.2d 1479, 1481 (8th Cir. 1990) (*Westborough III*) (Appendix C). On remand, the trial court again held against Petitioners. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 757 F.Supp. 1022 (E.D. Mo. 1991)

(Appendix D). Finally, in the most recent appeal a divided panel of the Eighth Circuit affirmed the District Court. *Westborough Mall, Inc.* v. *City of Cape Girardeau, Missouri*, 953 F.2d 345 (8th Cir. 1991) (*Westborough IV*) *reh'g denied* (February 6, 1992) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1991, and a timely petition for rehearing was denied on February 6, 1992. Copies of the judgment and the order denying rehearing are reproduced in Appendices E and F, respectively. The petition was filed within 90 days of February 6, 1992. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the construction and application of the Fifth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. § 1983. The pertinent language of these provisions is reproduced in Appendix G.

STATEMENT OF THE CASE

In December of 1973, Westborough began work on a regional shopping center on approximately 67.5 acres of land in the City of Cape Girardeau, Missouri. On June 5, 1974, Westborough's application for C-4 zoning to build a shopping center (Westborough Mall) was granted by Ordinance No. 904, and pursuant thereto, substantial work on site plans as well as efforts to attract tenants commenced.

Chapter 30, Section 31(e) of the City's Zoning Code provides that property rezoned to C-4 shall automatically revert to its original zoning classification unless a shopping center is constructed on the property. Specifically, Section 31(e) of the Zoning Code stated that:

> In the event the shopping center is not constructed, it shall revert to the same zoning classification existing prior to the change to the "C-4" District and the district regulations in force prior to the establishment of the commercial district shall thereupon be in full force and effect.

Section 31(e) did not provide for any notice or hearing prior to reversion. Ordinance No. 904 specifically exempted the property from the automatic reverter provision of Section 31(e).

Westborough obtained a building permit for the entire site and began site work, including substantial grading, after passage of Ordinance No. 904. Westborough spent approximately $800,000.00 in construction costs on grading, the installation of a complex, underground drainage system, entrances, a swale and a berm.

On April 4, 1979, the City granted other developers approval to construct West Park Mall to compete with Westborough Mall. Westborough challenged the City's process for rezoning the West Park Mall site by filing a petition in state

court on April 5, 1979. The next day, on April 6, 1979, following a special City Council meeting convened to discuss Westborough's lawsuit, the City Manager announced to the local media that the Westborough's C-4 zoning had reverted and that the site was no longer zoned for a shopping center. Local television news and the Cape Girardeau newspaper carried the story. Following this announcement, on April 11, 1979, the City Manager delivered a memorandum instructing the City Engineer to carry out the reverter. The City Manager's instructions to the City Engineer to change Westborough's zoning were expressly based on Section 31(e) of the Zoning Code, on his duty to supervise the Engineering Department, and on his statutory obligation to enforce all ordinances. The City Manager prepared a Study Session Report (a formal document to communicate with the City Council) stating that he had instructed the City Engineer to revert Westborough's zoning. At the City Council's April 17, 1979 study session, the City Manager formally advised the Council that Westborough's zoning had automatically reverted. The Mayor and Council specifically concurred in the City Manager's decision to revert the zoning.

Accordingly, in April, 1979, the City's official zoning map was changed, reverting Westborough's zoning. The City gave no notice to Westborough of the City's actions to revert the Westborough Mall C-4 zoning; nor was any hearing ever offered to Westborough or held.

Westborough's competitor, the West Park Mall, then advised its potential anchor tenants that Westborough's zoning had expired and that its property had reverted to its previous zoning status by revision to the official zoning map. The City Manager wrote the firm handling Westborough's financing that the C-4 zoning had reverted and that the site was no longer zoned for a shopping center, enclosing a copy of the City's official zoning map showing the reversion of the zoning

on the Westborough Mall site circled in red and a copy of Section 31(e) (the automatic reverter provision in the City's Zoning Code). Based upon this notice Westborough's financier stopped work on obtaining financing for the project, concluding that without zoning it would be impossible to get financing. Westborough was prevented from proceeding with its development and its leasehold interest in the property was rendered unmarketable.

On September 17, 1980, almost a year and a half after the official zoning map had been changed, the City Council adopted Ordinance No. 1599, reaffirming that Westborough's property was zoned C-4. Westborough had effectively been deprived of its C-4 classification from April, 1979 until September, 1980 without notice or hearing. During this time, the competitor, the West Park Mall, was allowed to develop.

THE BASIS OF FEDERAL JURISDICTION

The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1337 and 1343.

ARGUMENT

Despite its extensive procedural history, *Westborough IV* was ultimately decided against Westborough based upon two stark propositions:

(1) That the City Manager's conduct reverting Westborough's zoning from April, 1979 to September, 1980 was illegal under Ordinance No. 904; and

(2) That Westborough should be denied relief because it knew the City could not legally revert its favorable zoning.

The first proposition squarely presents a question expressly left open in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986). By reason of the second proposition, the court erronesouly refused to reach the issue of liability, holding that Westborough suffered no actual injury as a result of the City Manager's actions.

This case raises extremely significant questions of law with implications for all private persons who deal with local government. Indeed, Westborough respectfully suggests that the issue left open in *Pembaur* is as significant as the issues decided in *Monroe* v. *Pape*, 365 U.S. 167 (1961) and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). *Monroe* established the paradigm for individual liability where unconstitutional conduct violates state or local law. *Monell* established the paradigm for entity liability where formal policies are unconstitutional. The case at hand presents the opportunity to decide whether *entity* liability can exist where unconstitutional conduct violates state or local law. Recognizing that review on a writ of certiorari is not a matter of right, nonetheless, we respectfully suggest that there are special and important reasons why this writ should be granted.

I. The Eighth Circuit Erred When it Decided That the City of Cape Girardeau Cannot be Liable for its City Manager's Unconstitutional Conduct that was Illegal under Local Law.

This is a case of conflicting policies. In acting pursuant to one of these policies (Section 31(e) of the Zoning Code), the City Manager necessarily violated another local policy (Ordinance No. 904). This case thus presents the question of whether a local government can be held liable for a policymaker's unconstitutional conduct that is also illegal under local law.

The question of whether unconstitutional acts which violate local law can constitute official policy was first raised by two of the six-person majority in *Pembaur*, 475 U.S. at 485-87 (White, J., concurring) and 491 (O'Connor, J., concurring). Justice White argued in *Pembaur* that such conduct does not amount to official policy, because "local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy." *Id.* at 486. The Court has not resolved this issue since *Pembaur*.[1]

By leaving this question unanswered, the Court has left the lower federal courts free to answer it as they see fit. Thus a number of federal courts have agreed with the position taken by Justice White in *Pembaur* and have ruled that acts which contradict local law can never translate into official policy. *See, e.g., Bigford* v. *Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) ("his 'deliberate or mistaken departure from the con-

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[1] Commentators on this important "attribution" issue have so recognized. *See, e.g.*, S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 6.10, p. 439 (3d Ed.) ("Still open, though, is the question of whether a local government can be held liable for a policymaker's conduct that is illegal under state or local law.")

trolling law' cannot be said to represent county policy."); *Williams* v. *Butler*, 802 F.2d 296, 304 (8th Cir. 1986) (*en banc*) (Ross, J., dissenting) ("[T]he unlawful act . . . was clearly unlawful at the time it was committed . . . the City cannot be held responsible . . . ."); *Adamson* v. *Volkmer*, 680 F.Supp. 1191, 1198 (N.D.Ill. 1987) ("Chief Hall did not have the authority under state or local law to initiate a policy directly contrary to the fourth amendment."); *Joiner* v. *City of Ridgeland, Miss.*, 669 F.Supp. 1362, 1370 (S.D.Miss. 1987) ("Case's decision to allow a city clerk to sign the Joiners' arrest warrants was plainly illegal under the statutory law of Mississippi. . . . The Court is of the opinion that the situation is like the one described by Justice White in *Pembaur*.").

On the other hand, a number of circuits have held that the conduct of government officials may constitute official policy even though that conduct violates state or local law. *See, e.g.*, *Wetzel* v. *Hoffman*, 928 F.2d 376, 378 (11th Cir. 1991) ("Even assuming that the particular policy followed by Hoffman was in violation of some announced municipal policy, *i.e.*, a municipal ordinance or other law, Wetzel has alleged that there was a persistent and widespread practice which was inconsistent with any such announced policy of the city."); *Turner* v. *Upton County, Tex.*, 915 F.2d 133, 137 n.3 (5th Cir. 1990) ("The county contends that it cannot be subject to liability because it did not authorize the sheriff to violate the law. This argument is without merit."); *Bateson* v. *Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (city's denial of building permit constituted official policy even though denial violated city regulations); *Anela* v. *City of Wildwood*, 790 F.2d 1063, 1067 (3rd Cir. 1986) (city's routine noncompliance with state rule governing individuals arrested without a warrant constituted official policy for purposes of municipal liability); and, *O'Quinn* v. *Manuel*, 773 F.2d 605, 608 (5th Cir. 1985) ("Moreover, this Court has repeatedly held that municipalities or supervisors may face liability

under section 1983 where they breach duties imposed by state or local law.").

The facts of this case present this issue in an extremely clear-cut fashion simply because this Court need not concern itself with whether the City Manager was a policymaker — an issue thoroughly addressed by this Court's prior official policy cases. In this case the City Manager was clearly delegated power to establish final policy with respect to reverter of Westborough's zoning. That power was expressly delegated by local law, namely Section 31(e) of the City's Zoning Code. On the other hand, Ordinance 904 — while it did not repeal or amend Section 31(e) — nonetheless specifically barred Petitioners' property from the automatic reverter provision of Section 31(e). This case cleanly presents to the Court the issue of whether conduct implementing one governmental policy which is prohibited by another governmental policy can create entity liability under Section 1983.[2]

If given the opportunity, we respectfully suggest that we will demonstrate that when two inconsistent formal policies are in effect, property owners must be given an opportunity to be heard precisely because of that inconsistency. The opinion of the Eighth Circuit allows local government to avoid liability by the simple characterization of conduct implementing inconsistent policies as "mistakes." It also transmutes a

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[2] This issue goes not only to the question of liability but also to determining damages. As pointed out by Senior Judge Heaney in his dissent, "[t]he district court and the majority of this panel both assert that because Westborough knew the city could not [legally] revert its favorable zoning permit, it should be denied relief." *Westborough IV* at 348 (Heaney, J., dissenting). The appellate court's decision held that because the reversion of Petitioners' C-4 zoning was contrary to Ordinance 904, and because Petitioners knew that the reversion was illegal under Ordinance 904, the City did not cause actual injury. Yet the evidence presented at trial clearly proved that Petitioners suffered substantial damage to their leasehold interest in land during the nineteen months that their C-4 zoning was denied.

property owner's knowledge of such mistakes into a form of immunity shielding governmental entities from even a threshold inquiry into the entity's liability for a deprivation of private property. *Compare Chalmers* v. *City of Los Angeles*, 762 F.2d 753, 758 (9th Cir. 1985) (violation of due process caused by an inconsistent scheme of ordinances). If Westborough had been given an opportunity to be heard, perhaps it could have prevailed upon its rightful claim that Ordinance No. 904 created a legitimate claim of entitlement to a continuation of the C-4 zoning. After all, due process of law exists for that very reason: to provide a forum for hearing such claims. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interest can be prevented." *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972). *See also Carey* v. *Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken* or unjustified deprivation of life, liberty, or property." [Emphasis added]), and *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) ("Procedural due process rules are shaped by the risk of error inherent in the truth-finding process."). We believe that the open question from *Pembaur* must be resolved in Westborough's favor.

Westborough will show that the City Manager's conduct was neither random nor unauthorized under *Parratt* v. *Taylor*, 451 U.S. 527 (1981); and, that the deprivation of due process was contemplated by a legislative scheme, to wit: Section 31(e) of the Zoning Code. In sum, Westborough seeks the opportunity to explore fully the impact of *Parratt* on the question left open in *Pembaur*. Finally, Westborough seeks to show the relationship of *Monroe* v. *Pape*, 365 U.S. 167 (1961) to the *Pembaur* question, where *Monroe* makes clear that individuals "clothed with the authority of state law" act under color of state law even when they violate the law.

Given this Court's decisions in *Monroe*, *Parratt* and *Pembaur*, it is beyond question that the facts of this case squarely present one of the most important legal issues of the day. *Monroe* established that individual liability can exist under Section 1983 even when acts violate state or local law. Practitioners in the field must find out whether governmental entities, as with individuals, can be liable where conduct implementing official policy violates law.

II. The Eighth Circuit Erred by Holding That a Deprivation of Constitutional Rights is Not Actionable Unless the Plaintiffs Can Show Proof of Actual Injury.

The District Court held "that Plaintiffs suffered no actual injury as a result of the (City Manager's) actions." *Westborough Mall*, 757 F.Supp. at 1025. Affirming, Judge Fagg in *Westborough IV* stated:

> Because we affirm the district court on the ground of damages, we need not decide the liability issue reserved in *Westborough III*.

953 F.2d at 348.

The majority opinion in *Westborough IV* decided this case backwards: because it found no damages, it held that there was no need to address liability. However, if the panel had ruled first on the issue of liability it would have recognized that Westborough, at the very least, was entitled to nominal damages. Furthermore, had the Eighth Circuit ruled on the City's liability for depriving Westborough of its property rights without due process of law, it might have addressed more directly Westborough's damage claim for loss in property value over the period of the deprivation (and not for lost income from an as yet to be built shopping center).

There can be no question that a plaintiff who has prevailed on the issue of liability is entitled to nominal damages. Thus, it is essential that a court first decide the issue of liability in Section 1983 cases. In *Carey* v. *Piphus*, 435 U.S. 247 (1978), two students filed a Section 1983 claim alleging that they were suspended from school without due process of law. Because the suspensions were deemed proper, this Court held:

> Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the

> fact remains that they were deprived of their right to procedural due process . . . Common law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money . . . Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266.

Similarly, in *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299 (1986), this Court reaffirmed its holding that a prevailing party in a Section 1983 case is absolutely entitled to nominal damages: "[N]ominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury . . . ." 477 U.S. at 308 n. 11. *Compare Yuba Natural Resources, Inc.* v. *United States*, 821 F.2d 638, 641 (Fed. Cir. 1987) (holding that the Fifth Amendment prevents a holding of no compensation where liability for a taking exists), (citing *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7 (1949)); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief"); and *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980) ("How 'uniquely amiss' it would be, therefore, if the government itself — 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' — were permitted

to disavow liability for the injury it has begotten.") Moreover, the decision in *Westborough IV* is squarely at odds with the decision in *Rogers* v. *Kelly*, 866 F.2d 997 (8th Cir. 1989); *Hogue* v. *Clinton*, 791 F.2d 1318 (8th Cir. 1986); *Graham* v. *Baughman*, 772 F.2d 441 (8th Cir. 1985); and *Gahey* v. *Edwards*, 759 F.2d 337 (8th Cir. 1984).

There can be no question that Westborough suffered a constitutional deprivation caused by Section 31(e) of the City's Zoning Code. In *Westborough I*, the court stated that "from April 1979 to September 1980 the Plaintiffs were effectively deprived of their C-4 classification." 693 F.2d at 741. In *Westborough II*, the court concluded that this was "the law of the case." 794 F.2d at 336. The court also recognized that because no *pre-deprivation* notice or hearing had been given, this deprivation was without due process.[3]

> The availability of post deprivation remedies is not a defense to the denial of procedural due process where pre-deprivation process is practicable . . . There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a pre-deprivation hearing."

794 F.2d at 337.

In *Westborough III*, the court specifically reserved the issue of liability. 901 F.2d at 1480. Yet, inexplicably, in *West-*

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[3] Conversely, in *Westborough IV*, the majority held that because Westborough knew the City could not properly revert Westborough's favorable zoning (given the prohibitions of Ordinance No. 904), Westborough should be denied relief. 953 F.2d at 348 (where Judge Heaney, dissenting, stated, "I could not disagree more with this argument."). Obviously, Westborough's knowledge of the legitimacy of its position is worthless without a pre-deprivation hearing giving Westborough the right to invoke Ordinance No. 904 in a proper forum *before* its property was deprived. The reoccurring assertion in this case that a phone call by Westborough to the City would have sufficed in place of a hearing is absurd. In *Westborough I*, the court acknowledged that this argument was "without merit." 693 F.2d at 740 n.4.

borough IV, the court stated, "we need not decide the liability issue reserved in *Westborough III*." 953 F.2d at 347.

Petitioners have a fundamental right to a determination of whether their constitutional rights have been deprived, even if they cannot show that such deprivation caused actual injury. *Carey*, 435 U.S. at 266. In sum, the majority opinion has so far departed from the decision in *Carey* as to call for an exercise of this Court's power of supervision. Failure to review the majority opinion will leave conflicting decisions on the import of *Carey*.

III. The Eighth Circuit Should Not Have Affirmed the District Court on Grounds Directly Contradicted by a District Court's Finding, Without Holding that Such Finding was Clearly Erroneous.

This case presents an issue concerning an appellate court's authority to base its affirmance on a proposition directly contradicted by a trial court finding of fact which was not, and under *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), could not, be found to be clearly erroneous.

At trial, Westborough offered expert testimony in support of its claim for damages arising from a loss in the value of its leasehold interest as a result of the City's reversion of its zoning. Westborough's experts testified as to the "before" and "after" values of the leasehold. The testimony also established that during the time the reverter was in place (April 6, 1979 until September 17, 1980), the City's actions placed a "cloud" over Westborough's property that prevented development efforts to co-venture the project and any sale of the long-term lease. The Eighth Circuit in *Westborough I* and again in *Westborough II* recognized this fact, holding that "from April 1979 to September 1980 plaintiffs were effectively deprived of their C-4 classification." *Westborough I*, 693 F.2d at 741; *Westborough II*, 794 F.2d at 336. As the court noted in *Westborough I*:

> Before the reverter in April of 1979, the plaintiffs had a valuable leasehold interest in the only land in Cape Girardeau that was zoned for an integrated shopping center and on which site improvements had already been made. Assuming Cape Girardeau is a 'one shopping mall town' this interest should have been marketable, yet the evidence suggests that the plaintiffs may have been unable to sell their leasehold after the announcement of the reversion as a result of the

> cloud that had been placed over the status of their property.

693 F.2d at 742.

The trial court also recognized this fact, noting that Westborough's expert witnesses testified that

> for all practical purposes the C-4 zoning was no longer in effect and had reverted as of the April 6 announcement creating a cloud that precluded development and impaired marketability of the property.

Westborough Mall, 757 F.Supp. at 1024.

The District Court denied Petitioners' claim for damages for loss in value for a single reason:

> Neither appraiser included in his calculation a deduction for the increased rents plaintiffs would have been obligated to pay to the fee owners based upon sales in the mall.

Id.

For "this reason" alone (pertaining to "rent overrides"), the trial court held that "the testimony of plaintiffs' expert appraisers, although uncontroverted, is without probative value . . . [and] plaintiffs have failed to establish their claim for injury to their leasehold interest . . . ." *Id.*[4]

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[4] The Eleventh Circuit's four opinions in *Wheeler* v. *City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) (*Wheeler I*); 746 F.2d 1437 (11th Cir. 1984) (*Wheeler II*); 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*); 896 F.2d 1347 (11th Cir. 1990) (*Wheeler IV*), present a factual setting strikingly similar to this case, including the presence of a trial court judge who would not be moved by the mandate of a superior court to award damages. Unlike

The Eighth Circuit, however, chose not to consider or address the issue presented for review by Westborough challenging the trial court's finding pertaining to rent overrides. *Westborough IV*, 953 F.2d at 347. Rather, the appellate court considered evidence concerning Westborough's efforts to develop a shopping center, the difficulties it encountered and debts incurred, and concluded that its project was "plagued with problems" and therefore suffered no damages as a result of the reverter. *Id.* The appellate court apparently did not recognize that Westborough's claims for damages did not focus on lost revenues from the mall, but rather solely upon the value of the leasehold itself and how it was reduced as a result of the reverter.

This reliance by the appellate court on the suggestion that Westborough was unable to develop a mall because of its own ineptitude is simply not permissible here. The trial court recognized that:

> [Plaintiffs' experts] both testified that the loss in value to plaintiffs' leasehold interest did not depend on plaintiffs' ability to construct a regional shopping mall on the site and was solely related to the value of the site before and after the loss of zoning.

Westborough Mall, 757 F.Supp. at 1024.

This testimony was based upon evidence that negotiations to co-venture the project with a major shopping center developer came to a halt when the reverter was announced. Similarly, Westborough's efforts to sell the leasehold were un-

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the case at hand, the eleven-year struggle of the *Wheeler* plaintiffs ended when the Court of Appeals calculated and awarded substantial damages to the plaintiffs. 896 F.2d at 1351-52 (*Wheeler IV*). Likewise, the dissenting judge in *Westborough IV*, Senior Judge Heaney, would have awarded Westborough $1,375,000. in damages. 953 F.2d at 349.

successful because of the cloud on its zoning. Thus, the District Court made a specific finding of fact that:

> Plaintiffs' claim for damages does not depend upon their ability to develop a regional shopping mall.

Id. at 1025.

The Court of Appeals did *not* hold that this factual finding was clearly erroneous. Nor did the Court of Appeals consider Federal Rules of Civil Procedure Rule 52(a)'s clearly erroneous standard. In *Dennison Mfg. Co.* v. *Panduit Corp.*, 475 U.S. 809 (1986), this Court held that a case must be remanded where the Court of Appeals has reversed the trial court but did not address the Rule 52(a) clearly erroneous standard.

There is little doubt that the Court of Appeals could not meet this burden here. This Court has stated that:

> When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent can virtually never be clear error.

Anderson v. *Bessemer City*, *supra*, 470 U.S. at 575.

This Court should grant review to determine whether a Court of Appeals, in affirming a District Court decision on a new theory not even briefed by the parties, should consider whether the foundation for that theory is supported by the lower court's findings and, if not, show how those findings are clearly erroneous.

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2314

Westborough Mall, Inc., a Corporation; George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its Sole General Partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a Municipal Corporation; Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 19, 1982
Filed: November 12, 1982

Before HEANEY, Circuit Judge, HENLEY,* Senior Circuit Judge, and BECKER,** Senior District Judge.

* Judge Henley assumed senior status June 1, 1982.

** The Honorable WILLIAM H. BECKER, United States Senior District Judge, Western District of Missouri, sitting by designation.

HEANEY, Circuit Judge

This action was brought by Westborough Mall, Inc., and others to challenge actions taken by the City of Cape Girardeau, city officials and various private individuals and business concerns involved with the development of the West Park Mall, a shopping center located in the City of Cape Girardeau. The Westborough Mall developers claimed that the city illegally acted to deprive them of their zoning rights without due process of law. They also alleged that city officials and the West Park Mall developers illegally conspired to preclude competition by improperly reverting the C-4 zoning the Westborough developers had obtained to construct the Westborough Mall and then granting development rights to the West Park group. Finally, they asserted that two ordinances rezoning the West Park Mall property were illegal.

On October 27, 1981, the district court entered summary judgment in favor of the city and the West Park Mall developers. Although we agree with the district court that the Westborough developers lack standing to challenge the zoning changes granted to the West Park group, we find there is sufficient evidence that the city deprived the Westborough developers of their zoning rights without notice or a hearing to preclude a judgment as a matter of law. We also believe there are genuine issues of material fact regarding the existence of an illegal agreement between city officials and the West Park Mall developers to intentionally interfere with the progress of the Westborough Mall. We therefore reverse the district court in part and remand for a trial on the merits of these claims.

Our holding is based upon the established rule that summary judgment is justified only when, viewing the facts and inferences that may be deprived therefrom in a light most favorable to the nonmoving party, the court is convinced there is no evidence to sustain a recovery under any discernible cir-

cumstances. *Ralph's Distributing Co. v. AMF, Inc.*, 667 F.2d 670, 672 (8th Cir. 1981); *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The burden is thus on the defendants to establish their right to judgment as a matter of law; there must be no genuine issue of material fact and no room for doubt or controversy. *See id.; St. Louis County Bank v. United States,* 674 F.2d 1207, 1209 (8th Cir. 1982). A review of the facts in this case demonstrates why, in view of these standards, the district court erred in granting summary judgment.

Both plaintiff George Staples, Jr., and defendant Charles Drury, President of Drury Industries, Inc., had expressed interest in developing a shopping mall in the City of Cape Girardeau in the early 1970's. In 1973, Staples entered into a long-term lease on approximately sixty-seven acres of land for the purpose of constructing a regional shopping facility, referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted ordinance 904, which rezoned the Westborough Mall property to C-4, a zoning change that the owners of the property had applied for upon the mayor's suggestion to Staples that C-4 zoning was required for the development of a regional facility. This ordinance exempted the property from another local ordinance, Chapter 30, § 31, subsection (e) of the Code of Ordinances, which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in force prior to the establishement of the C-4 district.

It was not until several years after the plaintiffs obtained C-4 zoning that Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop a competing center, the West Park Mall. The West Park Mall was to be located on land owned by Drury that was less than one mile from the Westborough site.[1] The gravamen of plaintiffs' complaint is

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[1] The defendants concede that the two sites are equal in terms of development potential. The district court apparently assumed for

that the city and the West Park Mall developers conspired to preclude competition by the plaintiffs by illegally reverting their C-4 zoning. The plaintiffs claim that this action was taken to allow the May-Drury defendants the opportunity to secure tenants and begin operation of the West Park Mall.

The district court held that there was no evidence of a conspiracy and, further, that any action taken by the city or the private defendants regarding the status of plaintiffs' zoning had no effect on the viability of plaintiffs' project, since plans for the development of Westborough Mall had not materialized and the project was in essence a failure. The plaintiffs argue that the existence of an illegal conspiracy may be inferred from the nature of the relationship between city officials and defendant Charles Drury and from the improper actions taken by the city to revert plaintiffs' C-4 zoning only two days after granting the defendants' zoning petition, actions which allowed the defendants to complete their financing plans for the West Park Mall development. The plaintiffs also contend that there is a genuine issue of material fact as to the viability of their project, which renders summary judgment inappropriate.

The facts that support plaintiffs' position may be summarized as follows: Commencing in 1973, plaintiff Staples attempted to secure tenants for the Westborough Mall, especially anchor (or major) tenants such as J. C. Penney, Sears or Famous-Barr. No major tenants expressed interest, however, and Staples abandoned his plans for approximately two years. Then, in September, 1976, Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the city in June, 1977. That same month, the city council enacted ordinance 1204, which corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4.

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purposes of deciding defendants' motions for summary judgment that Cape Girardeau was a "one shopping mall town." We adopt this assumption as well.

Site work on the Westborough project also began in 1977. Water drainage systems were installed, a survey was conducted and grading and other surface improvements were made. By December, 1978, the plaintiffs had expended more than $1 million on the development. No anchor tenants had yet committed themselves to the project, but letters of interest from many smaller stores had been received. Steps were being taken to secure additional financing to begin construction of the mall shell, and because of the reluctance of any major store to become a tenant, the plaintiffs were investigating a new anchor store concept — an "Elite" store composed of a number of small tenants.

Defendant Drury's plans for a shopping mall in Cape Girardeau were also proceeding during this time period. Drury sought to enter into a joint venture with the May defendants, who were experienced shopping mall developers. His discussions with May officials culminated in at least a tentative agreement with them to proceed to develop the West Park Mall in 1977. The agreement was a beneficial one in several respects, one of which was the probability of obtaining a Famous Barr store as an anchor tenant because Famous Barr was a subsidiary of May. An October, 1977, memorandum[2] by Drury to the Drury Industries Board of Directors suggested:

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[2] Many of the facts in support of plaintiffs' claims are contained in documents produced by the defendants in discovery and submitted by the plaintiffs to the district court. The plaintiffs' requests for additional time for discovery to depose the private defendants were denied by the district court. The plaintiffs allege on appeal that the district court erred in this refusal. We find no abuse of discretion. *See Moore v. Sylvania Electric Products, Inc.*, 454 F.2d 81, 83 (8th Cir. 1972).

The defendants challenge any reliance upon the documents submitted by the plaintiffs, alleging that they are an unauthenticated "hodge-podge" of notes that are inadmissible hearsay and should not be considered in evaluating the district court's grant of summary judgment. The district court ruled that it considered "all the evidence submitted," and we believe the documents are sufficiently reliable for us to determine whether the record as a whole supports the district court's decision in this case. *See generally Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1302-1303 (9th Cir. 1978).

> Participation by [May Stores] in the center does not automatically guarantee that a Famous Barr store will be in the center. However, the track record is that [May] is not involved in any center that does not have a first-line May department store in it. A Famous Barr store in Cape Girardeau is a calculated risk. With [May] participation in our center, however, it is very doubtful that Famous Barr, in the event it does not go in our center, will go in any other competitive center in our market area.

Drury's contribution to the joint venture included assistance in dealing with city officials. Indeed, Drury had received a letter from the city attorney as early as 1974, about the same time that plaintiff Staples was informed by the mayor that C-4 zoning was required to build a shopping mall, which indicated that Drury could proceed to develop his center with C-2 or regular commercial zoning.[3] As Drury later disclosed to May officials, his strategy was "low key." In 1977, he informed them that he already had talked with defendant Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all of the West Park Mall property. Drury believed that C-2 zoning would allow plans for the shopping mall to proceed in secret for as long as possible, thus avoiding any challenge by plaintiffs or others who might seek to thwart the development.

The evidence supports plaintiffs' suggestion that Drury and Lawley, the city manager, worked closely together to obtain the zoning change required for the West Park Mall property. After a September, 1978, meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center

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[3] The city attorney's letter suggested that a C-4 classification was preferable, however, and Drury appears to have recognized that C-4 zoning would ultimately be required for a regional shopping facility. The city attorney's letter gave Drury the option of performing initial work with only C-2 zoning.

site in exchange for the Silver Spring Road extension" right-of-way that he owned. Moreover, Drury reassured May officials that because the "center is desired by the powers that be," there was no risk in initially seeking C-2 zoning and worrying about the C-4 zone later. Indeed, a schedule adopted by the defendants for obtaining the necessary zoning was characterized by Drury as "C-2 zoning per Lawley schedule."

Finally Drury himself prepared the city manager's report to the city council concerning the West Park Mall's application for C-2 and then C-4 zoning. Lawley merely edited Drury's draft of this report prior to submitting it to the council on February 6, 1979. Drury's draft explicitly stated his desire to apply for C-2 zoning "with no mention of a subsequent or follow-up C-4 rezoning request."

Drury's zoning "strategy" raised some concerns with anchor tenants he was trying to attract to the West Park Mall, however. Notes of a phone conversation produced by Drury indicate that Drury's ability to obtain the required C-4 zoning was questioned by at least one prospective anchor tenant, J. C. Penney, even though Drury attempted to be very reassuring. "[Z]oning will not be a problem," Drury's notes stated, although because of plaintiffs' C-4 zoning, the J. C. Penney spokesperson could "hardly believe [Cape Girardeau] will zone * * * a second shopping center site."

Penney's concern regarding the West Park Mall zoning was important to the May-Drury defendants, since neither the plaintiffs nor the defendants had yet been successful in attracting anchor tenants. The West Park Mall was in direct competition with plaintiffs' Westborough Mall for these tenants, and the evidence in the record demonstrates that the defendants carefully monitored the plaintiffs' progress. For example, a June 6, 1978, memorandum from a May official states that because "Cape Girardeau cannot support two centers," Famous Barr should decide quickly whether it was interested in participating in the West Park Mall. The memo suggested that because of

reports concerning plaintiffs' competing site, "[o]ur partner, Charles Drury is insisting we attempt to firm up both J. C. Penney and Sears now; followed immediately by Dillards if Famous Barr has not made up its mind by the end of this month."

Drury's concern about plaintiff's progress is also reflected in his notes in September, 1978 — the same month he met with city officials concerning the West Park Mall's rezoning application. These notes somewhat cryptically state, "Staples — trouble — attack zoning." Drury also wrote in February, 1979, "stop them from building so we maybe get a chance to build." The plaintiffs allege that this is exactly what happened in April of 1979.

On April 4, 1979, the city council approved defendant Drury's C-2 zoning application for the West Park Mall, after a hearing at which the plaintiffs and others objected to the change. On April 5, plaintiff Staples filed suit in state court to challenge the city council's action. The next day, Lawley, the city manager, announced to the press that plaintiffs' zoning had reverted from C-4 to residential. The local television news and the Cape Girardeau newspaper carried the story. On April 11, 1979, after conferring with the city attorney, Lawley instructed the city engineer to change the city's master zoning map to show a reversion of the Westborough site from C-4 to its original zoning. The engineer followed these directions.

Lawley presented his opinion that plaintiffs' C-4 zoning had reverted by operation of Chapter 30, § 31, subsection (e) of the Code of Ordinances to the city council on April 13. Lawley said that because the plaintiffs had not built a shopping mall on their property within three years of the original C-4 grant in 1974, this ordinance operated to automatically revert their zoning to the classification in force prior to the establishment of the C-4 district.[4] Lawley stated that the reverter would be applied to

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[4] Lawley was wrong; plaintiffs' zoning was exempt from the application of the reverter ordinance in the Cape Girardeau Code of Or-

plaintiffs' property until he was ordered otherwise by the city council or a court. Although the city council discussed the issue, no action was taken at this meeting.

Thus, on April 20, 1979, a May official was able to report to a J. C. Penney official not only that the defendants' C-2 application had been granted, but also that

> the City Council has reviewed the file of the zoning proceedings on the Westborough site. In doing so, they have concluded that because of the wording of the zoning regulations, requiring essential completion of the project within three (3) years from the date of an enactment of the C-4 ordinance, and since no construction on the site has begun, that the C-4 zoning on the Westborough site has expired and ground has reverted to its previous zoning status of M-1, light industrial, and R-1, residential. In a conversation with the City Manager, he informed me that he is revising the zoning map to reflect this change. He has also directed the engineering department not to issue a building permit for the Westborough project. It is probable that this action will be challenged and will ultimately be resolved in court. However, this would effectively preclude any developement by the Westborough group until this issue is resolved.

On May 23, 1979, plaintiffs' financier, Green, wrote to the city manager requesting clarification of the status of the Westborough Mall's zoning. Lawley replied that, in his opinion, the C-4 zoning had reverted, and he enclosed a copy of the zoning ordinances and the official zoning map, which reflected the reversion, with his response. Green accordingly notified the plaintiffs that he was suspending his attempts to obtain perma-

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dinances. The defendants argue that because the plaintiffs knew Lawley was wrong and failed to bring the error to his attention, they somehow waived their right to challenge his actions. This argument is clearly without merit.

nent financing for plaintiffs' project until the zoning issue was resolved.

The West Park Mall developers then obtained a second rezoning of their property from C-2 to C-4 on August 1, 1979. Over the next year, the plaintiffs were unable to progress in the development of Westborough Mall. Work on the West Park Mall project continued and the mall ultimately was opened in 1981. It was not until September 17, 1980, almost a year and a half after the master zoning map was changed, that the city council adopted ordinance 1599, which "reaffirmed" that the Westborough Mall site was zoned C-4. As the plaintiffs had believed throughout, this ordinance confirmed that because the plaintiffs' C-4 grant was specifically exempted from the application of Chapter 30, § 31, subsection (e), no automoatic reverter could be applied to the Westborough Mall site.

In view of these facts and the inferences that reasonable persons might draw from them, the plaintiffs contend on appeal that the district court erred in granting summary judgment on all seven counts of their complaint. We will consider each of the plaintiffs' allegations in turn.

I.

In Count 1 of their complaint, the plaintiffs allege that the City of Cape Girardeau, the city manager and five city council members violated 42 U.S.C. § 1983. The plaintiffs challenge the district court's grant of summary judgment as to this count on the grounds that the court erroneously held that the city is immune from suit under section 1983, the city took no official action with respect to plaintiffs' zoning for the mall, and the acts of the defendants had no detrimental effect on plaintiffs' development.

In *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980), we held that local officials who acted in a legislative capacity were immune from suit under section 1983. *Id.* at 613-

614. Our ruling was based in part upon the recognition that municipalities may be held liable for unconstitutional conduct. *Id.* at 613. *See Owen v. City of Independence,* 445 U.S. 622, 657 (1980). The plaintiffs do not contend that the district court misapplied *Gorman* with respect to the individual city officials. Rather, they interpret the court's ruling as granting the city itself immunity, and argue that this holding must be reversed.

The city acknowledges that it may be liable under section 1983 if official action was taken to deprive the plaintiffs of their constitutional rights, and we believe that the district court's opinion does not hold to the contrary. In our view, the district court based its grant of summary judgment in favor of the city primarily on its view that no official action was taken by the city with respect to the alleged reversion of plaintiffs' C-4 zoning. On appeal, the city has argued that no official action was taken because the city manager's actions concerning the C-4 reversion were merely expressions of his own opinion and did not result in any change in the status of plaintiffs' zoning. In context of a motion for summary judgment, this contention cannot be accepted.

As chief executive officer of the city, the city manager is responsible for enforcing the city's zoning ordinances. *See* Mo. Rev. Stat. § 78.610(2). After conferring with the city attorney, city manager Lawley acted pursuant to this authority and directed that the official zoning map be changed to reflect a reversion of the zoning on plaintiffs' Westborough Mall site from C-4 to its prior classification. Lawley also instructed that no building permit should be issued for the mall. The city engineer followed these directions.

Moreover, although the city manager is "subject to the direction and supervision of the council," *id.*, Lawley communicated his opinion that Chapter 30, § 31, subsection (e) applied to revert plaintiffs' C-4 zoning to the city council, and told them of his instructions to the city engineer. The council enacted no or-

dinance explicitly ratifying Lawley's conduct, but an ordinance would not necessarily be required if the council agreed with Lawley's position. The city's argument that a city manager's action becomes official policy only upon the enactment of a resolution by the council is thus unpersuasive in this situation, since by knowing inaction, the city may have ratified Lawley's action here.

The official zoning map of the city was changed to eliminate plaintiffs' C-4 zoning. Lawley, the mayor and the city engineer publicly stated that the plaintiffs had lost their C-4 zoning, and Lawley reiterated this position in his letter to plaintiffs' financier. This erroneous reversion was corrected when the city enacted ordinance 1599 "reaffirming" plaintiffs' right to C-4 zoning, but from April, 1979, to September, 1980, the plaintiffs were effectively deprived of their C-4 classification.

We therefore find that the district court erred in its summary judgment that the city took no official action with regard to Westborough Mall zoning. The actions by city officials in this case were not merely isolated incidents, *see Landrigan v. City of Warwick,* 628 F.2d 736, 746-747 (1st Cir. 1980), but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning. *See Black v. Stephens,* 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied,* 102 S.Ct. 1646 (1982); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980). We find the plaintiffs have presented sufficient evidence that the reversion of their zoning "was caused by the official conduct of * * * those whose acts may fairly be said to represent official policy," *Owen v. City of Independence,* 589 F.2d 335, 337 (8th Cir. 1978), to preclude a grant of summary judgment on this ground.

The district court also appeared to base its grant of summary judgment on its findings that the city manager's actions "had no detrimental effect on Westborough Mall's development in light of the Mall's prior history and potential by April, 1979," and that there was "no evidence of a link between the acts of

either [the city defendants or the West Mall developers] to damages suffered by plaintiffs." As the district court correctly noted, the plaintiffs owed money to the Penzel Construction Company and to the Bank of New Madrid, had been unsuccessful in securing anchor tenants and had not yet filed an application for the financing necessary to develop the Westborough Mall when the city announced in April, 1979, that the plaintiffs' C-4 zoning had reverted to residential and manufacturing classifications.

We agree with the plaintiffs, however, that the district court failed to view the evidence in a light most favorable to them when it concluded as a matter of law that the plaintiffs' interests were in no way damaged by defendants' actions. The district court, in essence, held that the evidence compelled the conclusion that the Westborough Mall failed because of plaintiffs' poor business skills. In making this judgment, the court made "a choice of inferences to be drawn from the subsidiary facts" presented by both parties, *United States v. Diebold,* 369 U.S. 654, 655 (1962), a choice which is impermissible on a motion for summary judgment.

Our review of the record leads us to conclude that there is a genuine issue of material fact as to the viability of plaintiffs' development. Staples' testimony,[3] Green's testimony and documents produced by the defendants could reasonably support the conclusion that the Westborough Mall failed to attract major tenants and to obtain further financing because the land

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[3] The defendants characterize Staples' testimony as "self-serving and conclusory opinions and conjecture," which they argue cannot serve as a basis for denying summary judgment. Unlike the situations presented in the cases cited by the defendants, *see, e.g., Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 556-557 (5th Cir. 1980), *cert. denied,* 454 U.S. 927 (1981); *Thornhill Publishing Co. v. General Telephone & Electronics Corp.,* 594 F.2d 730, 738 (9th Cir. 1979), there are specific facts which support the plaintiffs' view of the effect of the reverter, however.

lost its C-4 designation at the same time that a competitor—defendants' West Park Mall development—was granted the required zoning to develop a regional shopping facility. The plaintiffs had invested over $1 million in the Westborough Mall project; site preparations had been made and letters of interest had been received. The defendants viewed plaintiffs' progress as a potential threat to their plans. Moreover, there is evidence that temporary financing could perhaps have been obtained to construct the Westborough Mall shell, even without an anchor tenant committed to the project, had plaintiffs been given the opportunity to develop the "Elite" store concept. The plaintiffs' financier halted his efforts to obtain such financing after the zoning controversy developed.

Before the reverter in April of 1979, the plaintiffs had a valuable leasehold interest in the only land in Cape Girardeau that was zoned for an integrated shopping center and on which site improvements had already been made. Assuming Cape Girardeau is a "one shopping mall town," this interest should have been marketable, yet the evidence suggests that the plaintiffs may have been unable to sell their leasehold after the announcement of the reversion, as a result of the "cloud" that had been placed over the status of the zoning of their property. The plaintiffs have thus presented facts that they were damaged by the application of the reverter to their property through September, 1980, when the council enacted ordinance 1599 reaffirming their entitlement to the C-4 classification. We therefore find that the district court erred in concluding as a matter of law that the plaintiffs were not damaged in any way by the reverter, and accordingly we hold the court erred in granting summary judgment on Count 1 of plaintiffs' complaint.

II.

Counts 2 through 4 of plaintiffs' complaint contain various allegations of a conspiracy between the city defendants and the West Park Mall developers regarding the reverter of plaintiffs'

C-4 zoning and the grant of C-2 and then C-4 zoning to the private defendants: Count 2 alleges a conspiracy between the city and the West Park Mall developers to deprive the plaintiffs of their constitutional rights; Count 3 alleges a conspiracy among all the defendants to restrain trade in violation of section 1 of the Sherman Act; and Count 4 alleges a conspiracy to monopolize the shopping center market in violation of section 2 of the Sherman Act. In granting summary judgment on these claims, the district court stated that the "plaintiffs have been unable to unearth a shred of evidence linking an improper act of the City defendants to the private developers' efforts to build West Park Mall."

The plaintiffs concede that "the evidence of conspiracy is not direct and overwhelming," and we agree with this statement. Nonetheless, the elements of a conspiracy are rarely established through means other than circumstantial evidence, *see, e.g., Crowe v. Lucas,* 595 F.2d 985, 993 (5th Cir. 1979), *cert. denied,* 102 S.Ct. 1251 (1982), and summary judgment is only warranted when "the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided." *Admiral Theatre Corp. v. Douglas Theatre Corp.,* 585 F.2d 877, 883 (8th Cir. 1978) (citations omitted). The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy. *Id.* at 884. *See Poller v. Columbia Broadcasting System,* 368 U.S. 464, 472-473 (1962).

Our review of the record in view of these standards convinces us that the district court erred in its conclusion that there was *no* evidence of a conspiracy between the city officials and the May-Drury defendants.

In order to establish a cause of action based upon a conspiracy in this case, the plaintiffs had to show with at least circumstantial evidence that the private developers made a deal with the city or with at least some of the city officials whereby

the city would act to stop plaintiffs' Westborough Mall by casting doubt upon the status of their zoning long enough to allow the defendants' West Park Mall to secure tenants and to obtain a sufficient "head start" on construction. The circumstantial evidence of such an illegal agreement consists of the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to "stop them from building so maybe we get a chance to build," and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction.

Defendant Drury has filed an affidavit stating that no Drury defendants "knew in advance about, participated in, or contributed to Mr. Lawley's opinion" regarding the C-4 reversion, and Lawley has denied the existence of any agreement to assist the West Park Mall developers by taking plaintiffs' zoning from them, but we find there is sufficient evidence of a possible conspiracy to illegally revert plaintiffs' zoning to withstand a motion for summary judgment.

The preferential treatment accorded Drury by city officials is illustrated by the facts concerning the West Park Mall zoning. Drury was confident that zoning would not present a problem for his development plans at a very early date, even though the plaintiffs had obtained a C-4 classification and the defendants believed that Cape Girardeau could only support one shopping mall facility. Drury was allowed to proceed under a C-2 classification, while the plaintiffs were advised that a C-4 zone was required. Drury's feeling that the West Park Mall was "desired by the powers that be" suggests that he had struck an agreement with the city officials that would ensure his mall's success. Although proof of private meetings with city officials may not be sufficient evidence of any improper arrangements, Drury's involvement with city officials went beyond such meetings: Drury obtained a "tacit" agreement for C-4 zoning

prior to any city council action concerning either the C-2 or C-4 zoning changes that he requested, he wrote most of the city manager's report to the city council concerning his rezoning request, and he referred to his zoning application plans as "C-2 per Lawley schedule."

We wish to emphasize that this preferential treatment alone would not be grounds for a cause of action by the plaintiffs: the relationship between the city and Drury is, however, evidence from which a trier of fact could infer the existence of a conspiracy to deprive the plaintiffs' of their zoning rights.

Other circumstantial evidence of an illegal agreement to revert the plaintiffs' C-4 zoning includes the defendants' desire to stop plaintiffs' development, or at least slow it down, so that West Park Mall could be brought to a stage where it could effectively overcome competition by the plaintiffs. Prior to the reverter announcement, the record shows that the May-Drury defendants considered the Westborough Mall to be a "competing site"—indeed, they concede there is no inherent advantage to their location over that of the plaintiffs. They acted to secure anchor tenants as quickly as possible when it appeared that the plaintiffs might be in a position to sign such tenants. The plaintiffs had begun site preparations and had obtained both the required zoning and a building permit from the city when Drury's notes in February, 1979, state "stop them from building so we maybe get a chance to build."

The May-Drury defendants do not deny that the reversion of plaintiffs' zoning was of great benefit to them. Only days after the reverter was announced, they told J. C. Penney officials, who had doubted Drury's ability to obtain council approval for another C-4 district in the City of Cape Girardeau, that the reverter would effectively preclude any development of the Westborough Mall until the status of plaintiffs' zoning was resolved in court.

Finally, the timing of the reverter supports an inference of a conspiracy to delay plaintiffs' project by reverting their C-4

zoning. Ordinance 904, enacted in 1974, granted the plaintiffs a C-4 classification and specifically stated that the grant was exempt from the requirement of the city's reverter ordinance. Yet, in 1979, two days after the defendants obtained C-2 zoning on all of their property, and two years after the automatic reverter would have gone into effect, the city manager reviewed the Westborough file, missed the explicit reference to the exemption, forgot about its existence even though he was the city manager at the time the ordinance was enacted, and announced that, in his opinion, the plaintiffs' C-4 zoning had reverted to its prior classification.

It is true that no city official appears to have a direct financial interest in the West Park Mall, but Drury's association with the May defendants may have allowed him to offer the city a Famous Barr store if the West Park Mall were allowed to develop according to Drury's plans, which the plaintiffs in effect could not.[6] Or, perhaps the city was interested in Drury's right-of-way, which he may have offered the city in exchange for the "tacit" agreement for a C-4 district in September, 1978.

Under all of these circumstances, giving the plaintiffs the benefit of the reasonable inferences that may be derived therefrom, we believe the district court erred in concluding as a matter of law that no conspiracy existed. The inference that defendant city officials and the West Park Mall developers conspired to deprive the plaintiffs of their legal right to C-4 zoning and to block their development plans is not an irrational one.

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[6] Famous Barr is a subsidiary of the May Company. In a February 14, 1979, phone conversation with a May official regarding Drury's strategy to obtain the required zoning changes for the West Park Mall, Drury stated, "[w]e'll have to talk to these people quietly—we can't bring this out in the open meeting, but * * * if we have to, we'll produce the letter from Famous saying * * * this is the only site in Cape Girardeau that they will * * * [locate in]." While this conduct alone is not illegal, it is evidence from which a trier of fact could infer an illegal agreement with the city to revert plaintiffs' zoning.

Although the facts in support of such a conspiracy are not conclusive, they also are not "meaningless," as the defendants contend.

In sum, our review of the facts presented thus far convinces us that the defendants were not entitled to a summary judgment in their favor under section 1983 or under sections 1 or 2 of the Sherman Act. Although the record is not fully developed, we believe the district court erred in granting summary judgment on the grounds that there was no official action by the city regarding the status of plantiffs' zoning, that there was no evidence of a conspiracy, and that there was no evidence that the actions of the defendants had a detrimental effect on the viability of the plaintiffs' project or the value of their leasehold interest. The city may be liable to the plaintiffs under section 1983 if the plaintiffs establish at trial that the city acted under color of state law to deprive them of their property rights without due process. *See generally Parratt v. Taylor,* 451 U.S. 527, 535 (1981). The West Park Mall defendants may also be liable under section 1983 if the plaintiffs can prove the existence of a conspiracy with the city to deprive them of these rights.

Moreover, we cannot say at this stage that the plaintiffs' antitrust claims are wholly without merit. The plaintiffs may recover under their section 1 Sherman Act claim if they prove at trial that there was an agreement between the city officials and the West Park Mall developers which was intended to harm or unreasonably restrain trade; that as a direct result plaintiffs have been injured; and that the damages sustained are capable of reasonable ascertainment and are not speculative or conjectural. *Rosebrough Monument Co. v. Memorial Park Cemetary,* 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied,* 107 S.Ct. 2915 (1982); *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 883-884. The defendants may also be liable under section 2 of the Sherman Act for a conspiracy to monopolize the shopping center market if the plaintiffs can establish: (1) the existence of a conspiracy, (2) overt acts in furtherance of the con-

spiracy, (3) a substantial amount of commerce, and (4) a specific intent to monopolize.' *See generally* 2 Von Kalinowski, Antitrust Laws and Trade Regulation, § 6.01[1]&[3] (1982); 3 *id.*, § 7.01.

The defendants assert that even if the plaintiffs successfully prove all the elements of a section 1983 or an antitrust violation, the district court's grant of summary judgment should be upheld because all the defendants were protected from liability under the *Noerr-Pennington* and *Parker v. Brown* doctrines. We disagree. The *Noerr-Pennington* doctrine exempts from the antitrust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). *See generally* 7 Von Kalinowski, Antitrust

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' Count 6 of plaintiffs' complaint also alleged an illegal monopoly in violation of section 2 of the Sherman Act. Assuming arguendo that the regional shopping center market in Cape Girardeau is the relevant market for antitrust purposes and that Cape Girardeau would only support one shopping center, the defendants argue that the plaintiffs' monopolization claim must fail as a matter of law because the West Park Mall defendants are "natural monopolists" who succeeded through fair competition. These defendants boldly assert that they "succeeded simply because they knew what they were doing and plaintiffs failed because they didn't." We rejected the district court's conclusion to this effect above. When the facts are viewed in a light most favorable to the plaintiffs, there is evidence to support the inference that the defendants achieved their "monopoly" through "exclusionary, unfair, or predatory means." *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 991 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978). *See Superturf, Inc. v. Monsanto Co.,* 660 F.2d 1275, 1277, 1279 (8th Cir. 1981). While "a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it," in this case there is an "affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp. v. Newspapers of New England, Inc.,* 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961) (citations omitted). Hence, the district court erred in granting summary judgment against the plaintiffs on their illegal monopolization claim.

Laws and Trade Regulation, *supra,* § 46.04. This exemption is based upon the First Amendment and hence extends to any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers v. Pennington, supra,* 381 U.S. at 670. The plaintiffs argue the *Noerr* exemption does not apply in this case because government officials are alleged participants in the conspiracy. *See Duke & Co. v. Foerster,* 521 F.2d 1277, 1281-1283 (3d Cir. 1975). This coconspirator exception has been criticized, however, *see, e.g., Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 229-230 (7th Cir. 1975), and we decline to base our decision on the presence of the government as a defendant herein.

Rather, we find that the defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150, supra,* 440 F.2d at 1099. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra,* § 46.04[3] at 46-55. In *Gorman Towers, Inc. v. Bogoslavsky, supra,* we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption. *Id.,* 626 F.2d at 615. Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal*

Prescription Service, Inc. v. American Pharmaceutical Ass'n, 663 F.2d 253, 266 (D.C.Cir. 1981), *cert. denied,* 102 S.Ct. 1293 (1982).

We also disagree with the district court's holding that the state action exemption established in *Parker v. Brown,* 317 U.S. 341 (1943), precludes any liability by the defendants as a matter of law. *Parker* immunity is intended to exempt from the antitrust laws state actions that are anticompetitive in nature. "[W]here a restraint upon trade or monopolization is the result of valid governmental action * * * no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* 365 U.S. at 136. The *Parker* doctrine applies to municipal action "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Community Communications Co. v. City of Boulder,* 50 U.S.L.W. 4144, 4147 (1982). Even if zoning in general can be characterized as "state action," *see Sound, Inc. v. American Telephone & Telegraph Co.,* 631 F.2d 1324, 1334 (8th Cir. 1980) (factors relevant to determining "state action"), a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy. *See Stauffer v. Town of Grand Lake,* 1981-1 CCH Trade Cases ¶ 64,029 at 76,330 (D. Colo., October 9, 1980); *Mason City Center Associates v. City of Mason City,* 468 F. Supp. 737, 741-744 (N.D. Ia. 1979). *See also Guthrie v. Genesee County,* 494 F. Supp. 950, 955-958 (W.D.N.Y. 1980).

III.

Finally, we must address plaintiffs' contentions that the district court erred in granting summary judgment against them on their state law claims: Count 5, which alleged a conspiracy to interfere with plaintiffs' valid business relationships and contract rights; and Count 7, which challenged the ordinances granting C-2 and C-4 zoning to the defendants. The district court

dismissed Count 5 by holding that the efforts of the West Park Mall developers were legitimate business activities and that plaintiffs' mall failed because of their poor business skills, not because of any actions by the defendants. Because of our finding that the district court erred in making these conclusions as a matter of law, we also reverse the grant of summary judgment as to Count 5 of plaintiffs' complaint. We believe there are genuine issues of material fact as to whether the defendants illegally conspired to thwart plaintiffs' efforts to develop Westborough Mall and whether the reversion of plaintiffs' C-4 zoning caused the plaintiffs' development to fail. As we have previously stated, we decline to apply the *Noerr-Pennington* doctrine under the circumstances of the present case, and, therefore, reject defendants' argument that it supplies an alternative ground for upholding the district court's grant of summary judgment on this count. *Cf. First National Bank v. Marquette National Bank,* 482 F.Supp. 514, 524-525 (D. Minn. 1979), *aff'd,* 656 F.2d 191 (8th Cir. 1980), *cert. denied,* 450 U.S. 1042 (1981) (*Noerr-Pennington* doctrine protects the defendants from liability on tortious interference claim "to the extent that plaintiffs' claims are based upon lobbying and litigation activities [and] there are no genuine issues as to any material facts").

Count 7 of plaintiffs' complaint challenged the reasonableness of the rezoning of the West Park Mall. The district court held that the plaintiffs had no standing to challenge the change in defendants' zoning and in any case found ordinances 1437 and 1369 to be valid. We affirm the district court's grant of summary judgment on this count because we agree that the plaintiffs lack standing under state law to object to the ordinances at issue.

Missouri law currently provides that in order to have standing the plaintiffs must be aggrieved parties — that is, they "must demonstrate a specific and legally cognizable interest in the subject matter of the [challenged] decision and that [they have]

been directly and substantially affected thereby." *Palmer v. St. Louis County,* 591 S.W.2d 39, 41 (Mo. App. 1979) (citations omitted). *See* Mo. Rev. Stat. § 89.110. Competitive disadvantage alone does not give rise to standing, *Schmitt v. City of Hazelwood,* 487 S.W.2d 882, 888 (Mo. App. 1972), and although plaintiffs' leasehold is less than one mile from the West Park Mall, they have failed to demonstrate how the city's rezoning of defendant's property — apart from the reversion of plaintiffs' C-4 zoning — affects a protectable interest of the plaintiffs beyond mere competitive disadvantage. *See Palmer v. St. Louis County, supra,* 591 S.W.2d at 41. The plaintiffs' land is not directly adjacent, contiguous to, or within sight of defendants' land. *See, e.g., Schweig v. City of St. Louis,* 569 S.W.2d 215, 220-221 (Mo. App. 1978) (and cases cited therein).

The harm allegedly suffered by the plaintiffs as a result of the city defendants' actions occurred because of the reversion of *their* C-4 zoning. Although the fact that defendants' property was rezoned is related to the damage to plaintiffs' interests, the rezoning *alone* would not have caused any special injury to them other than affording them competition. Thus, we affirm the district court's grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.[4] Because we agree that the plaintiffs lack standing under current state law, we need not consider the district court's rulings on the substantive issues raised by the plaintiffs.

IV.

In conclusion, we reverse the district court's grant of summary judgment in favor of the city and the private defendants

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[4] It has been suggested that Missouri law on the issue of standing may be undergoing some change. If any such change occurs prior to the entry of final judgment by the district court, the court is free to reconsider its decision that plaintiffs lack standing in view of the new developments in state law.

on Counts 1 through 6 of plaintiffs' complaint.[9] The district court, in holding that the plaintiffs were not entitled to judgment on these claims as a matter of law, weighed the evidence presented without giving the plaintiffs the benefit of the reasonable inferences that could be made from the facts presented; genuine issues of material fact preclude summary disposal of these counts. The district court correctly held that the plaintiffs lack standing to challenge the West Park Mall rezoning under current state law and we, therefore, affirm the grant of summary judgment in favor of all defendants on Count 7 of plaintiffs complaint.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[9] We affirm the district court's grant of summary judgment in favor of the individual city officials. *See Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 613-614 (8th Cir. 1980).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1356, 84-1304

Westborough Mall, Inc., a corporation, George Staples, Jr., individually, and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership,
Appellees,

vs.

City of Cape Girardeau, Missouri, a municipal corporation,
Appellant.

Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Drury Industries, Inc., a corporation and May Centers of Cape, Inc., a corporation.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,
Appellants,

vs.

City of Cape Girardeau, Missouri, a municipal corporation, Charles L. Drury, Drury Industries, Inc., a corporation, May Department Stores Co., a corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a corporation and May Centers, Inc., a corporation,
Appellees.

Submitted April 11, 1985
Decided June 17, 1986

Before LAY, Chief Judge, McMILLIAN, Circuit Judge, and WOODS,* District Judge.

McMILLIAN, Circuit Judge.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri limited partnership, (appellants) appeal from a final judgment entered in the District Court for the Eastern District of Missouri upon a jury verdict in a 42 U.S.C. § 1983 action in favor of the City of Cape Girardeau, Missouri (the City), members of the city council in their individual capacities, Drury Industries, Inc., May Department Stores Co., West Park Associates, May Centers of Cape, Inc., and May Centers, Inc. (appellees). Appellants alleged a denial of procedural due process, a conspiracy between the City and the private appellees to deprive them of their constitutional rights and antitrust violations. For reversal appellants argue that the district court erred (1) in instructing the jury, (2) in holding that the actions of the city officials did not represent official policy, and (3) in denying appellants' motion for directed verdict and for judgment notwithstanding the verdict on the procedural due process claim against the City. For the reasons discussed below, we reverse and remand for proceedings consistent with this opinion.

This case is before this court on appeal for the second time. In the first appeal a grant of summary judgment in favor of appellees was reversed and the case was remanded for trial. *Westborough Mall, Inc. v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982) (*Westborough I*), *cert. denied,* 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983). The following statement of facts is taken in part from the opinion in *Westborough I.*

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* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

In the early 1970's both appellant George Staples, Jr., and appellee Charles Drury, president of Drury Industries, Inc., separately expressed interest in developing a shopping mall in the City of Cape Girardeau, Missouri. In 1973 Staples entered into a long-term lease on approximately 67 acres of land for the purpose of constructing a regional shopping facility referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted Ordinance No. 904 which rezoned the Westborough Mall property to C-4, a zoning classification specifically designated for regional shopping center development. This ordinance also exempted the property from the provisions of another ordinance (Ch. 30, § 31(e)), which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in effect prior to the C-4 zoning. This latter ordinance is referred to as the automatic reverter provision.

Staples unsuccessfully attempted to secure "anchor" tenants for the proposed Westborough Mall shopping center. Regional shopping centers depend on "anchor" tenants which are large department stores; smaller stores generally will only agree to lease space in the shopping center after the "anchor" stores have agreed to lease.

In September 1976 Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the City in June 1977. Also in June 1977 the city by ordinance corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4. Site work began in 1977: a survey was conducted, water drainage systems were installed, and grading and other surface improvements were made. By December 1978 more than one million dollars had been spent on the Westborough Mall site. At this time Westborough Mall Associates had received letters of interest from many smaller stores although no anchor tenants had made a commitment. Steps were taken to

secure additional financing and Westborough Mall Associates was investigating a new anchor store concept — an "elite" store composed of a number of small tenants.

Appellee Drury's plans for a shopping center in Cape Girardeau were also proceeding during this period. Drury was interested in developing a shopping center called the West Park Mall which was to be located on land owned by Drury that was less than one mile from the Westborough site. Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop this center. May Centers, Inc., is an experienced shopping mall developer and Famous Barr Co., a large department store chain, is a subsidiary of the May Co.

Drury's contribution to the venture included dealing with city officials. In 1974 Drury received a letter from the city attorney which indicated that Drury had the option of performing initial work with C-2 zoning. In 1977 Drury informed the May officials that he had already talked with W. G. Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all the West Park Mall property. After a September 1978 meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center site in exchange for the Silver Spring Road extension right of way that he owned." On April 4, 1979, the city council approved Drury's C-2 zoning application.

On April 5, 1979, Staples filed a lawsuit[1] in state court challenging the rezoning of the West Park Mall site. On the

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[1] Appellants' action in state court against the five members of the city council individually sought a declaratory judgment that the C-2 zoning of the West Park Mall was invalid.

In July 1979, following the zoning of the West Park Mall to C-4, appellants filed their first amended complaint. The City of Cape Girardeau and a recently elected council member were added as defendants. Appellants sought an injunction against the existing West Park

next day, the city manager, announced to the media that appellants' C-4 zoning had reverted. The local television news and Cape Girardeau newspapers carried the story. On April 11, 1979, after conferring with the city attorney, the city manager[2] gave written instructions to the city engineer to change the City's master zoning map[3] to show a reversion of the Westborough site from C-4 to the original zoning. The city engineer followed these directions. The engineer was also directed not to issue or renew building permits for mall construction to appellants.

Mall rezonings, a permanent injunction against future rezoning, and $2.5 million for damage to their "reputation and credibility" resulting from the city manager's statements about the zoning of the Westborough Mall.

In March 1979 a second amended complaint was filed in state court. George Staples, Jr., and Westborough Mall Associates were added as plaintiffs and Drury Industries, Inc., May Centers, Inc., May Centers of Cape, Inc., W.G. Lawley and Charles L. Drury were added as defendants. The second amended complaint specifically pleaded the automatic reverter exemption and asked for a determination of the Westborough Mall C-4 status, a declaration that the West Park Mall rezonings were invalid, a prohibition against further West Park development, relief under 42 U.S.C. § 1983, $20 million actual damages, and $5 million punitive damages.

[2] W.G. Lawley, city manager of the City of Cape Girardeau, testified he was the chief executive officer for the City and was responsible for the administration of city government and the enforcement of city ordinances. He also testified that he supervised the City Engineering Department, which was responsible for issuing building permits.

[3] The City's master zoning map was a part of the zoning ordinance and is the official record of the zoning districts as established by City ordinance. The map is maintained during the life of the ordinance.

At a meeting of the city council on April 17, 1979, the city manager submitted a study session report to the council which advised the council that appellants' C-4 zoning had reverted by operation of the automatic reverter provision. The report stated in part: "[U]ntil instructed otherwise by the City Council or Court of proper jurisdiction, the City Manager intends to apply provisions of this section [automatic reverter section] to the Westborough Mall property." The city manager further stated that the automatic reverter provision applied because appellants had not constructed a shopping mall on the Westborough Mall site within three years of the granting of C-4 zoning in 1974. Although the city council discussed the issue, no action was taken at this meeting.

On May 23, 1979, appellants' financier wrote to the city manager concerning the status of the Westborough Mall zoning. The city manager replied that in his opinion the C-4 zoning had reverted and he enclosed copies of the ordinance and the official zoning map which reflected the reversion.

On August 1, 1979, the West Park Mall developers obtained a rezoning of their property from C-2 to C-4. Work continued and the West Park Mall opened in 1981.

In September 1980 the city council adopted Ordinance No. 1599, "reaffirming" that the Westborough Mall site was zoned C-4. This ordinance confirmed that the Westborough Mall's C-4 grant had been specifically exempted from application of the automatic reverter provision.

In 1980 appellees removed appellants' pending state action to federal district court. On September 5, 1980, the district court granted appellants' motion to file another amended complaint. The complaint as amended contained seven counts. Count I alleged a 42 U.S.C. § 1983 procedural due process claim against the City and the members of the city council and the city manager individually; Count II alleged a conspiracy to deprive

appellants of their constitutional rights; count III alleged a claim for antitrust violations.[4]

The district court subsequently entered summary judgment on all counts in favor of all defendants and denied appellants' request for summary judgment. In November of 1982 this court in *Westborough I* reversed the district court and held that appellants had stated sufficient facts to entitle them to a trial on the first six counts. 693 F.2d at 748. However, this court sustained the summary judgment in favor of appellees on Count VII seeking a declaratory judgment that the West Park Mall rezonings were invalid. *Id.* This court also held that appellants had no standing to challenge the West Park Mall rezonings. *Id.* This court further dismissed all counts against the members of the city council and the city manager in their individual capacities. *Id.*

A ten-day trial was held in October 1983 on the six counts. Appellants voluntarily dismissed three counts (Counts IV, V, and VI) and the jury returned a verdict in favor of appellees on the other three counts (Counts I, II, and III). Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied. This appeal followed. Appellees cross appealed from the denial of attorneys' fees. Appellants on appeal have abandoned their antitrust claims and appellees have abandoned their claim for attorneys' fees.

I. *Jury Instructions*

Appellants initially argue that the district court's instructions to the jury relating to Count I were prejudicially erroneous, confusing and misleading, and failed to properly charge the jury

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[4] Count IV was an antitrust conspiracy claim against all the defendants. Count V was a conspiracy claim for malicious interference with appellants' business. Count VI was a monopoly conspiracy claim. Count VII sought a declaratory judgment that the West Park Mall rezonings were invalid.

on key elements of the case. Appellants also assert that the district court's instructions disregarded the law of the case.

In reviewing the trial court's instructions to the jury, we must consider the charge as a whole. *E.g., Total Petroleum, Inc. v. Davis,* 788 F.2d 476, 484 (8th Cir. 1986). There is no harmful error if the charge in general correctly instructs the jury, even if one portion is technically incorrect. *Houston v. Herring,* 562 F.2d 347, 348 (5th Cir. 1977)(per curiam). However, "erroneous instructions are not cured by correct instructions in other portions of the charge when 'the charge leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberation.' " *Id.* (citations omitted). "The test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' " *Id.* at 359 (citation omitted). With these principles in mind, we consider each of appellants' challenges to the jury instructions.

Instruction No. 13 — Automatic Reverter

Instruction No. 13 on the automatic reverter stated in part: "You are instructed that plaintiffs admit that there has never been any legal reverter of the Westborough Mall tract." This statement was based on appellants' amended complaint, paragraph 14b, which stated: "[T]here, in fact, had been no reverter and...said purported reverter, publicized by defendants, was false and illegal, in that Ordinance 904 specifically excluded plaintiffs' land from the reverter provisions...."

Appellants argue that instruction No. 13 incorporated appellees' basic argument and was tantamount to instructing the jury that the City was not liable. Appellants contend that the district court should have given proposed instruction No. 7,[5]

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[5] Plaintiff's proposed instruction No. 7 read as follows:

> The Defendant, City of Cape Girardeau, should be found liable only if the City itself, by an official policy or custom,

which stated that the City may be liable for the actions of the city manager even though his actions were illegal. Appellees argue that the district court did not err in giving instruction No. 13 because it was extracted from appellants' amended complaint.

We conclude after a careful review of the instructions as a whole that instruction No. 13 is prejudicially erroneous because it is not a complete and accurate statement of appellants' position concerning the automatic reverter. Appellants have con-

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caused a violation of the Plaintiffs' constitutional rights. The City is not responsible merely because of an isolated incident where one of its employees acted. However, the City will be liable for the actions of the City Council or of other highranking officials who had final authority to act and whose actions may fairly be said to represent official policy.

It is not required that a policy be officially adopted by the City's lawmakers to create liability, although a resolution or ordinance is clearly the official policy of the City. If the action of a public official has the force of law, the City itself will be liable for acts of individual officers and employees committed pursuant to that action.

It is not required that there be an ongoing pattern of events to establish liability against the City. If a single event takes place pursuant to a general policy, or itself establishes policy, the City may be liable for that action. Moreover, you are instructed that the Defendant City's continuing failure to remedy or undue delay in stopping known unconstitutional conduct of its public officials is a type of informal policy or custom that gives rise to official policy.

You are specifically instructed that a person's action or conduct depriving Plaintiffs of a Constitutional right may fairly be said to represent official policy. In other words, because such action or conduct may be unlawful does not prevent official policy from being represented.

The City Manager is one City official whose actions represent municipal policy, especially if he joined with other high-ranking municipal officers in invoking municipal authority against the Plaintiffs.

sistently asserted that Ordinance No. 904 excluded the Westborough Mall site zoning from the application of the automatic reverter provision and the City later affirmed this. What appellants therefore complained about is not a reversion as the result of the automatic reverter provision, but rather the actions of the City which allegedly had the same effect as the automatic reverter provision. Instruction No. 13 is a serious distortion of appellants' theory concerning the actions of the City. The misleading information contained in instruction No. 13 is not corrected or clarified at any other place in the district court's instructions. *See, e.g., Hrzenak v. White-Westinghouse Appliance Co.,* 682 F.2d 714, 719 (8th Cir. 1982) (single erroneous instruction does not require reversal if error was cured by another instruction or by consideration of the entire charge).

In addition, we agree with appellants that this instruction is contrary to the law of the case. In *Westborough I,* this court considered appellees' argument that no reverter had occurred because the Westborough Mall site had been excluded from the operation of the automatic reverter. The court concluded that "from April 1979, to September 1980, [appellants] were effectively deprived of their C-4 classification." 693 F.2d at 741.

The court recognized then, as we do now, that the deprivation of a constitutional right does not depend on form. We must look at the substance of the actions taken relative to a constitutionally protected right. The essence of a right may be destroyed although the plaintiff's right is still recognized in an ordinance or in a legal title. As the Eleventh Circuit observed in *Reed v. Village of Shorewood,* 704 F.2d 943 (11th Cir. 1983), "deprived" in the due process sense cannot just mean destroy. "If the state prevents [one] from entering [his or her] house it deprives [him or her] of a property right even if the fee simple remains securely [his or hers]. A property right is not bare title, but the right to exclusive use and enjoyment." *Id.* at 949. So if it is true, as alleged by appellants, that appellees' actions destroyed the value of appellants' C-4 zoning right and forced

appellants ultimately to give up construction of a shopping center, appellants were deprived of their property right in the C-4 zoning, even though the C-4 zoning classification was never actually reverted or revoked.

Instruction No. 21 — Availability of Post-deprivation Remedies

Appellants next argue that instruction No. 21, which addresses post-deprivation remedies, was contrary to the law of the case and the law in this circuit. The district court instructed the jury that the availability of post-deprivation state remedies was a defense to a § 1983 action. The district court further instructed the jury that they must consider whether the various alternatives outlined in the instruction were adequate to correct the reverter.[6]

Appellees argue that the district court correctly instructed the jury that appellants had waived their complaints because they had not pursued available administrative or state judicial remedies to correct the mistake of the city manager. Appellees, relying on *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68

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[6] Instruction No. 21 read as follows:

> In considering whether plaintiffs have been deprived of any federally protected constitutional right, you must consider whether they had adequate "post-deprivation" state law remedies. By this I mean, even if you find that the purported "reverter" took place and was the result of an unlawful conspiracy between the City of Cape Girardeau and the West Park defendants you must further consider whether this resulted in a civil rights claim. In this regard, you should consider the fact that plaintiffs could have petitioned a court of the State of Missouri for preliminary injunction requesting that the alleged reverter be corrected. You should further consider the fact that plaintiffs could have sought to have the purported reverter corrected by the City of Cape Girardeau, by talking to the City Manager or the City Council. You must determine whether these various alternatives provided adequate methods of correcting the "reverter" under state law.

L.Ed.2d 420 (1981), argue that no constitutional deprivation occurred because of the availability of these state remedies.

This court in *Westborough I* considered appellees' argument that appellants by their failure to bring the error to the city manager's attention, waived their right to challenge the actions of the city manager. This court held that the waiver argument was "clearly without merit." 693 F.2d at 740 n. 4. Plaintiffs in § 1983 actions are not required to exhaust other remedies before resorting to suit in federal court. *Patsy v. Board of Regents,* 457 U.S. 496, 516, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (1982).

In addition appellees' and the district court's reliance on *Parratt v. Taylor* to bar appellants' claim is misplaced. The availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable. *Parratt v. Taylor,* 451 U.S. at 543, 101 S.Ct. at 1916; *Littlefield v. City of Afton,* 785 F.2d 596, 599 (8th Cir. 1986). There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a predeprivation hearing.

We conclude that this erroneous instruction requires reversal because it permitted the jury to improperly find that appellants suffered no constitutional violation because of the availability of state post-deprivation remedies. Indisputably, this instruction was critical to appellants' claim and resulted in prejudice to appellants.

Failure to Define "Official Policy"

Appellants next argue that the district court erred in refusing to define "official policy" and in refusing to give appellants' proposed instructions Nos. 7-10. Appellants argue that "official policy" is a legal term which has a specific meaning within the context of § 1983 litigation and is neither universally understood by lay persons nor appreciated in all its legal ramifications.

Appellees argue that the district court did not err in failing to define "official policy" because the term is readily understood by a jury. Appellees further assert that appellants' proposed jury instructions offered no definition of official policy. Rather appellants' instructions list the various actions which appellants contended constituted evidence that the city manager's conduct was official policy. Appellees lastly argue that appellants proposed instructions were properly refused because they misstated the law by requiring the jury to find official policy based on certain actions rather than permitting the jury to so find.

The district court, in instruction No. 6, referred to official policy but did not define "official policy." The court in this instruction identified five elements which the jury had to find in order to return a verdict for appellants. Two of these elements are relevant to this discussion. The district court stated that the jury must believe

> that a public official or employee of the Defendant City acted as follows: the City Manager directed that the official zoning map of the City be changed to reflect a reversion or change of [appellants'] zoning from a zoning district which allowed construction of shopping centers (District C-4) and "such action or conduct may fairly be said to represent *official policy*" of the ... City of Cape Girardeau.

(emphasis added).

The parties have not directed us to cases which have considered whether official policy must be defined nor have we found any cases which have discussed this particular issue. However, where terms are not readily understood by the jury or where the possibility of confusion concerning a term exists, the court should define or explain such a term. *See Federal Enterprises, Inc. v. Evans,* 786 F.2d 817, 820 (8th Cir. 1986) (instruction deficient because "key terms, requiring independent factual finding," were not defined); *Board of Water Works*

Trustees v. Alvord, Burdick & Howson & Dorr-Oliver, Inc., 706 F.2d 820, 824 (8th Cir. 1983). We do not agree with appellees that official policy in § 1983 cases is readily understood by a jury without instructions from the court.

"Official policy" had been defined or discussed in many cases prior to the trial of this case. *E.g., Williams v. City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982); *Turpin v. Mailet,* 619 F.2d 196, 201-202 (2d Cir. 1980). The court in *Westborough I* also offered guidance to the parties and to the district court on what constituted official policy.[7]

The Supreme Court, in a case decided after our decision in *Westborough I,* has once again defined public policy, which may be the basis of municipal liability. *Pembaur v. City of Cincinnati,* ____ U.S. ____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (*Pembaur*). The Court in *Pembaur* considered whether a single action by an official can result in county or municipal liability. The Court held that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." At ____, 106 S.Ct. at 1300. The Court further stated that municipal liability may be imposed for a single decision by a municipal policy maker if the

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[7] We note that the instruction offered by appellants is based substantially on this court's decision in *Westborough I.* This instruction, although not designated as a definition of official policy, is a substantially accurate definition of official policy. The district court, however, could have properly found the last two paragraphs of the instruction to be inaccurate in part. In the present case, where an instruction on official policy is essential to the jury's understanding of the case, the district court may not omit the instruction if the tendered instruction is not entirely correct. The court has the "duty to give the substance of the requested instruction where it appears that the instruction on the issue is [necessary] to enable the jury to determine intelligently the question." *Brandes v. Burbank,* 613 F.2d 658, 668 (7th Cir. 1980).

single act (1) is a decision of the legislative body, or (2) is executed in compliance with formal rules or understandings that are intended to, and do, establish fixed plans of action to be followed under similar circumstances, consistently and over time, or (3) is directed by those who establish governmental policy. *Id.* at ____ - ____, 106 S.Ct. at 1298. The Court recognized that municipalities often spread policy-making authority among various officers and official bodies; and, consequently, different officials may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. *Id.* at ____, 106 S.Ct. at 1300.

On remand, the district court should incorporate a definition of "official policy" in its jury instructions.

Instruction No. 30

Next, appellants argue that instruction No. 30 was erroneous because it required the jury to find that appellants had been injured in their business or property before the jury could return a verdict in favor of appellants on the § 1983 procedural due process claim. Appellants argue that injury to business or property is not a prerequisite to liability under § 1983 and that the instruction misled the jury into believing that the deprivation of constitutional rights is not in itself injury without more.

Appellees argue that this issue was not preserved for review because appellants failed to object to instruction No. 30. Further, appellees argue that appellants waived any error by putting the same requirement of damage in their own verdict instruction.

We find no support in the record for appellees' contentions. Although appellants did not object specifically to instruction No. 30 by number, the first objection made by appellants to the proposed charge was that "the proposed charge. . . will mislead the jury into believing that a deprivation of constitutional rights

is not in itself damage, and requires the jury to believe that there needs to be an extra showing of damage over and above that initial deprivation." Moreover, appellants did not, as appellees state, use language in their proposed instructions which corresponds at all to the instructions given by the district court. The only similarity is that both instructions require the jury to find that the actions of appellees have caused damage to appellants.

We hold that instruction No. 30 is prejudicially erroneous because it improperly permitted the jury to find against appellants if the jury found that appellants did not sustain damage to businesses or property. A plaintiff whose constitutional rights have been violated is entitled to a finding of liability and nominal damages even if no compensatory damages are shown. *Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978).

Instructions as a Whole

Appellants next argue that the instructions taken as a whole were prejudicially erroneous. First, appellants argue that the district court submitted multiple claims to the jury but did not adequately distinguish between the claims and the particular instructions related to each claim. We do not decide this issue because appellants made no objection at trial and cannot now raise this issue on appeal. Fed.R.Civ.P. 51; *Smith v. Honeywell,* 735 F.2d 1067, 1075 (8th Cir. 1984).

Appellants' next complaint is that instruction No. 1 unduly emphasized appellants' burden of proof. Appellants object to the length of the instruction but do not otherwise indicate in what way the instruction was erroneous. This argument is without merit. Instruction No. 1 consists of four short paragraphs and is an accurate statement of appellants' burden of proof.

Appellants also challenge the district court's reference in the instructions to "purported reverter." We find no error in this

usage because appellants also used the term "purported reverter" to indicate that the actions taken by the City had the effect of a reverter although the automatic reverter provision did not apply to them.

Appellants next complain that the district court in instruction No. 14 erred in referring to "defendants' zoning rights" when the reference should have been to "plaintiffs' zoning rights." The sentence as it was read to the jury stated: "Was there a conspiracy between the City of Cape Girardeau and the West Park defendants to cause a reverter of *defendants'* C-4 zoning rights?" (emphasis added) Instruction No. 14 as written correctly refers to "plaintiffs' zoning rights," but the district court inadvertently misread the instruction to the jury. Because there was no issue in this case concerning "defendants' zoning rights," we do not believe the jury was misled by the misreading of the instruction.

Appellants next complain that the district court improperly omitted a portion of their proposed instruction No. 6. The proposed instruction would have required the jury to find that the City had engaged in three actions whereas the instruction given by the court required the jury to find only one action by the City in order to return a verdict for appellants. Consequently, the deletion was not prejudicial to appellants because the district court eliminated additional requirements for a verdict in appellants' favor.

II. *Directed Verdict and JNOV*

Lastly, appellants argue that the district court erred in denying their motion for directed verdict and for judgment notwithstanding the verdict against the City under Count I. Appellants argue that the uncontradicted evidence showed that the City deprived appellants of their C-4 zoning rights without notice or hearing. Appellants urge this court to remand their § 1983 claims against the City for trial on the issue of damages alone.

Appellees argue that one of appellants' points of error on appeal in *Westborough I* was the denial of their motion for partial summary judgment. *Westborough I* did not explicitly consider this point. We agree with appellees, however, that appellants' motion for partial summary judgment was implicitly denied by the panel in *Westborough I.*

The standard for directed verdict and JNOV is the same. A verdict should be directed only when the evidence is such that "without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." *Savage v. Christian Hospital Northwest,* 543 F.2d 44, 46 (8th Cir. 1976) (citations omitted). "A directed verdict is in order only where the evidence points all *one way* and is susceptible of *no* reasonable inferences sustaining the position of the non-moving party.' " *Id.* (citations omitted). " 'In making this determination, the evidence together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party.' " *Id.* (citations omitted).

We hold that the district court did not err in denying the motion for directed verdict or JNOV. Reasonable persons could arrive at different conclusions in this case.

Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 89-1766.

WESTBOROUGH MALL, INC., a Corp., George Staples, Jr., individually, and as sole general partner of Westborough Mall Associates, a Missouri Limited Partnership, Appellants,

v.

CITY OF CAPE GIRARDEAU, MISSOURI, a Municipal Corporation; Paul W. Stehr, Oliver A. Hope, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W.G. Lawley, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted Feb. 12, 1990.
Decided May 1, 1990.

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Westborough Mall, Inc., a corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri limited partnership, (Westborough) appeal from a judgment in favor of the City of Cape Girardeau, the city council, and the city manager (the City) in Westborough's 42 U.S.C. § 1983 action. 710 F.Supp. 1278. Westborough claims the City deprived Westborough of property rights without due process.

This case is before the court for a third time. In the first appeal, we reversed a grant of summary judgment in favor of the City and the West Park Mall developers and remanded the case for trial. *Westborough Mall* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945, 103 S.Ct. 2122, 77 L.Ed.2d 1303 (1983) (*Westborough I*). We later reversed judgment based on a jury verdict for the City and the West Park Mall developers because the jury instructions were in error. *Westborough Mall* v. *City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 688 (1987) (*Westborough II*). On remand, the West Park Mall developers were dismissed, and by consent of the remaining parties, the case was tried to the court without a jury. Concluding the City was not liable for the conduct of its city manager, the court once more entered judgment for the City.

The underlying facts are contained in *Westborough I*, 693 F.2d at 736-40, and *Westborough II*, 794 F.2d at 332-35. Briefly, Westborough planned to develop a shopping mall in Cape Girardeau and obtained a long-term lease on land for the development. The city council enacted an ordinance rezoning the property to allow the construction of the shopping mall. The ordinance specifically exempted the property from the provisions of another ordinance that would have caused the zoning to revert to the classification previously held if the mall were not constructed within three years. Westborough spent over one million dollars in surveys, drainage systems, and other surface improvements. Several small stores expressed interest in the mall, but Westborough did not secure a commitment from any large store to be an anchor tenant.

At the same time, a different partnership was pursuing plans to develop West Park Mall less than a mile from the Westborough site. The partnership obtained a zoning classification from the city council permitting the partnership

to proceed with its plans. Westborough's developer filed suit in state court challenging the rezoning of the West Park site. The city manager announced the next day that the Westborough site's zoning had reverted because the mall was not constructed. The city manager also instructed the city engineer to change the City's master zoning map to show a reversion to the original zoning. The city council received a report from the city manager advising the council that the zoning classification had reverted. The city manager also informed Westborough's financier the zoning had reverted and sent the financier copies of the official zoning map reflecting the reversion. Westborough bases its claim against the City on these actions.

Relying in large part on *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), the district court decided the city manager's actions did not constitute the official policy of the City because policymaking authority for zoning rests with the city council. The court found the council did not authorize, ratify, or approve the city manager's actions, nor did the council delegate its policymaking authority to the city manager. The court concluded the City had done no more than employ an individual who made an erroneous discretionary decision and section 1983 liability did not attach to discretionary actions by City employees or agents. The district court thus entered judgment for the City.

Because the district court held the City was not liable for the city manager's actions, the court found it unnecessary to address whether his actions damaged Westborough and, if so, the amount of damages. Although we have not been asked to resolve the issue of damages on appeal, for the persent we choose to reserve judgment on the district court's liability determination until the question of damages is decided. This case has been in the courts for eleven years. We do no believe our decision on the issue of the City's liability for the city manager's actions will terminate the litigation, and we an-

ticipate another journey to the Supreme Court seeking certiorari. Should the ultimate result of the appellate process be a reversal of the district court's judgment, a remand to decide the damages issue will be required. We believe this matter can be resolved most efficiently and economically by disposing of the damages issue now. We will retain jurisdiction of this appeal, contingent on at least one of the parties' application to this court within the time normally allowed for notice of appeal following the district court's decision on the issue of damages.

Accordingly, we remand to the district court for further proceedings to decide whether and to what extent Westborough suffered damages as a result of the city manager's actions.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 80-0105 C

WESTBOROUGH MALL, INC., et al.,
Plaintiffs,

vs.

CITY OF CAPE GIRARDEAU, MISSOURI,
Defendant.

MEMORANDUM OPINION
(Filed February 11, 1991)

This matter is before the Court on remand from the United States Court of Appeals for the Eighth Circuit for the purpose of determining "whether and to what extent Westborough suffered damages as a result of the city manager's actions." *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 901 F.2d 1479, 1481 (8th Cir. 1990). The Court of Appeals remanded this matter for the limited purpose mentioned, retained jurisdiction and reserved judgment on this Court's liability determination. On remand, this Court proposed to make its determinations on the basis of the substantial record as to damages adduced in the prior proceedings. At the Court's invitation the parties submitted proposed findings of fact and conclusions of law relative to the issue of damages.

Plaintiffs' proposed findings of fact and conclusions of law adopted, reasserted and incorporated by reference their previously filed proposed findings and conclusions. They also

filed a reply to defendant's submission. The Court, having thoroughly considered these findings, the transcript of the trial and the documentary evidence adduced at trial, makes the following findings of fact and conclusions of law.

Findings of Fact

1. At trial plaintiffs introduced testimonial and documentary evidence in support of their damage claim. Mr. R. Jack Huntstein and William P. Dockins testified as expert witnesses in the field of real estate appraisal. Mr. Louis King testified as an accounting expert and John F. Burke, Jr. testified as an expert economist. Defendant also introduced testimonial and documentary evidence to rebut plaintiffs' claim.

2. The Court finds that Cape Girardeau could support only one regional mall in 1979.

3. In early 1979, after five years of effort to develop a regional shopping mall, plaintiffs had no anchor tenants, no cash, no commitments for financing, no architectural or building plans and no confirmed affiliation with any recognized regional mall development organization. Plaintiffs also had outstanding debts in the amount of $612,000.00.

4. The C-4 zoning designation of the plaintiffs' land authorized construction of only the specific tract layout and building plans which plaintiffs had proposed.

5. On March 18, 1979, the May/Drury developers announced their plans to develop a regional shopping mall in the Cape Girardeau area, to be known as the West Park Mall. May/Drury proposed to bring two well known stores, Famous Barr and J.C. Penny, into the project and had tentative commitments from each of these stores. Unlike plaintiffs, May and Drury were well financed, experienced developers with recognized reputations in the field.

6. On March 21, 1979, the City approved May/Drury's zoning application for a C-2 zoning designation of the West

Park Mall site to permit the development of a regional shopping mall to become effective on April 4, 1979.

7. On April 5, 1979, plaintiffs filed suit in state court alleging that the May/Drury zoning "substantially and permanently damaged plaintiffs' property and the uses for which it had been zoned."

8. On April 6, 1979, the City Manager publicly announced that he believed that plaintiffs' C-4 zoning designation had reverted to the prior classification. When the City Manager announced the reversion of plaintiffs' C-4 zoning designation, plaintiffs knew of the reverter exemption. Plaintiffs advised the press that the property still retained a C-4 zoning designation and assured their partners that they need not worry about the reverter announcement.

9. Apart from the institution of lawsuits, plaintiffs took no steps to notify the City or the City Manager that they still held their C-4 zoning due to the exemption.

10. Expert witnesses Huntstein and Dockins testified that "for all practical purposes . . . the C-4 zoning was no longer in effect and had reverted [as of the April 6 announcement] creating a cloud that precluded development and impaired marketability of the property." (Tr. 11-232-243, 246-258, 236-237, 249, 12-75-76, 97-94). Huntstein testified that, in his opinion, the loss in value to plaintiffs' leasehold interest in the property as a result of the City Manager's announcement was $2,487,000.00, taking into account the full $760,000 present value of all the lease payments. (Tr. 12-106-107). Dockins testified in his capacity as an expert appraiser that the loss in the value of the leasehold interest between the date of the May/Drury announcement and immediately after the City Manager's announcement was $2,050,000.00. Huntstein and Dockins both testified that the loss in value to plaintiff's leasehold interest did not depend on plaintiff's ability to construct a regional shopping mall on the site and was solely related to the value of the site before and after the loss of zoning. (Tr. 12-120).

Each of the expert appraisers arrived at his estimate of damage to plaintiffs' leasehold interest by valuing plaintiffs' interest in the land immediately before and immediately after the City Manager's announcement and then deducting the annual rents owed by plaintiffs to the holders of the fee. Neither appraiser included in his calculation a deduction for the increased rents plaintiffs would have been obligated to pay to the fee owners based upon sales in the mall. (Tr. 12-112, 113, 139).

For this reason the Court finds that the testimony of plaintiffs' expert appraisers, although uncontroverted, is without probative value. The valuation process used by each of plaintiffs' experts was flawed by their failure to take into account plaintiffs' obligation to pay an increased rent based upon the level of sales in the completed mall. The experts' opinions as to the decrease in value to plaintiffs' leasehold interest are therefore erroneous and the Court finds that plaintiffs have failed to establish their claim of injury to their leasehold interest in the property as a result of the reverter announcement.

11. On September 17, 1980, the City Council passed Ordinance No. 1599 reaffirming that the Westborough Mall tract was specifically exempted from the application of the automatic reverter provision and that the tract was zoned C-4. Plaintiffs contend that this action on the part of the City did not remedy the injury to their interest in the site because they already had lost their window of opportunity to develop the mall project. The Court finds that the reverter publicity affected the tract, if at all, only from April 6, 1979 through September 17, 1980. The Court further finds that plaintiffs failed to offer any credible evidence that the announcement of the reversion of plaintiffs' C-4 zoning had any adverse impact on the value of plaintiffs' interest in the site.

12. The Court finds that plaintiffs' failed to offer any credible evidence that the City Manager's opinion concerning

the status of plaintiffs' zoning caused anyone to take actions adverse to the preservation of plaintiffs' interest in the site. Plaintiffs offered evidence that as a result of the reverter announcement that their financier, Charles Green, decided to cease his efforts to obtain development loans for the project. This Court previously found that "[t]he city manager's opinion concerning the status of plaintiff's zoning did not materially influence Green's decision." *Westborough Mall v. City of Cape Girardeau*, 710 F.Supp. 1278, 1281 (E.D. Mo. 1989).

13. Plantiffs also seek to recover damages for the lost investment opportunity resulting from their inability to sell their leasehold interest in the property. Plaintiffs offered testimony that they were unable to sell the property until April of 1987 because of the announced reverter. Plaintiffs contend that if they had been able to sell the property they could have invested the proceeds of the sale and reaped a greater return on their investment. Plaintiffs' expert economist calculated the loss of return rate to be $1,054,207.00. The Court finds that plaintiffs' claim of damages resulting from lost investment opportunity is highly speculative and lacks a credible factual basis. There was no credible evidence that plaintiffs reasonably could have anticipated any particular rate of investment return from this project. In addition, plaintiffs' claim for lost rate of return is predicated on the questionable assumption that they are entitled to recover a fourteen per cent per annum rate of return every year for a period of eight years despite their involvement in a highly speculative mall development project. The Court accepts plaintiffs' assertion that their claims for damages does "not depend upon [their] ability to develop a regional shopping mall." However, the Court cannot disregard the degree of risk involved in the original investment when assessing plaintiffs' entitlement to remuneration for lost rate of return. Moreover, the Court notes that

although the reverter ended on September 17, 1980 when the City Council reaffirmed the C-4 zoning designation, plaintiffs failed to sell the property until 1987. There was no credible evidence to support plaintiffs' contention that the loss of investment return they allegedly suffered during those seven years was attributable to the reverter.

14. Pursuant to the parties' stipulation, the Court finds that plaintiffs received $10,000.00 in a pre-trial settlement with the following defendants: Charles L. Drury, Drury Industries, Inc., The May Department Stores Co., May Centers, Inc., West Park Associates and May Centers of Cape, Inc.

15. If the City were to be held liable for the actions of the City Manager with respect to plaintiffs' C-4 zoning designation, the Court finds that plaintiffs suffered no actual injury as a result of those actions.

Conclusions of Law

1. The Court concludes that the proper mode of calculating the decrease in value to plaintiffs' leasehold interest in the mall is as follows:

> The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the term, plus the value of the right to renew in the lease . . . , *less the agreed rent which the tenant would pay for such use and occupancy.*

United States v. *Petty Motor Co.*, 327 U.S. 372, 381, 66 S.Ct. 596, 90 L.Ed. 729 (1945), *quoted in Frontier Airlines, Inc.* v. *State Tax Commission*, 528 S.W.2d 943, 947 (Mo. 1975) (en banc) (emphasis supplied).

Although plaintiffs apparently concede that this is the proper measure of damages, their expert appraisers failed to properly apply this formula by failing to deduct certain rents

based upon sales in the mall which plaintiffs would have been obligated to pay to the owners of the fee. For this reason, the Court concludes that plaintiffs' expert appraisers failed to properly apply the legal standard for calculation of the loss in value to plaintiffs' leasehold interest in the site.

2. Plaintiffs failed to establish by a preponderance of the credible evidence that any loss in the value of their leasehold interest was attributable to the City Manager's announcement concerning the reversion of plaintiffs' C-4 zoning designation.

3. Plaintiffs failed to establish by a preponderance of the credible evidence that any individual was induced to take adverse action respecting their leasehold interest as a result of the City Manager's announcement.

4. Plaintiffs failed to establish by a preponderance of the credible evidence their entitlement to damages for lost investment opportunity.

5. Inasmuch as plaintiffs have failed to sustain their burden of proof as to compensatory damages, they are not entitled to an award of prejudgment interest.

6. Inasmuch as plaintiffs have failed to sustain their burden of proof as to compensatory damages, the Court finds it unnecessary to address the effect of the pre-trial settlement on the damage award.

Pursuant to the direction of the United States Court of Appeals for the Eighth Circuit, the Court herewith enters its findings and conclusions on the issue of "whether and to what extent Westborough suffered damages as a result of the City manager's actions." *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 901 F.2d at 1481.

Dated this 11th day of February, 1991.

/s/ GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1766EM
No. 91-1585EM

Westborough Mall, Inc., a Corp.;
George Staples, Jr., individually and as
sole general partner of Westborough Mall Associates,
a Missouri Limited Partnership,
Appellants,

v.

City of Cape Girardeau, Missouri; a Municipal Corporation;
Paul W. Stehr; Oliver A. Hope; Robert K. Herbst; Howard
C. Tooke; Samuel L. Gill; Gail L. Woodfin; W.G. Lawley,
Appellees.

**Appeals from the United States District Court
for the Eastern District of Missouri**

Submitted: September 9, 1991
Filed: December 9, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

FAGG, Circuit Judge.

Westborough Mall, Inc., George Staples, Jr., and Westborough Mall Associates (collectively Westborough)

brought this civil rights action against the City of Cape Girardeau, the city council, and the city manager, asserting the City deprived Westborough of property rights without due process. Westborough's claim stems from the city manager's erroneous statement that a zoning classification permitting development of a shopping mall on Westborough's property had reverted.

The case is before us a fourth time. We first reversed an order granting summary judgment in favor of the City and West Park Mall developers and remanded the case for trial. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (*Westborough I*). Next, we reversed a judgment based on a jury verdict in favor of the City and West Park Mall developers because of flawed jury instructions. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (*Westborough II*). On retrial without a jury, the district court concluded the City was not liable for the city manager's actions. We did not decide the liability issue on appeal. Instead, we retained jurisdiction of the liability issue and remanded the case for the district court to determine "whether and to what extent Westborough suffered damages as a result of the city manager's actions." *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 901 F.2d 1479, 1481 (8th Cir. 1990) (*Westborough III*). The district court found Westborough suffered no damages as a result of the city manager's actions. *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 757 F. Supp. 1022 (E.D. Mo. 1991). Westborough appeals its fourth loss in the district court. We affirm.

We explained the facts of this case in *Westborough I*, 693 F.2d at 736-40, *Westborough II*, 794 F.2d at 332-35, and *Westborough III*, 901 F.2d at 1480. We restate the facts here primarily as the district court found them. In 1974 Westborough began planning to develop a regional shopping mall in Cape Girardeau. 757 F. Supp. at 1023. Westborough

signed a long-term lease on land for the development. 901 F.2d at 1480. To allow construction of the shopping mall, the city council enacted an ordinance rezoning the property. *Id.* "The ordinance specifically exempted the property from the provisions of another ordinance that would have caused the zoning to revert to the classification previously held if the mall were not constructed within three years." *Id.* Five years later, Westborough still "had no anchor tenants, no cash, no commitments for financing, no architectural or building plans[,] and no confirmed affiliation with any recognized regional mall development organization." 757 F. Supp. at 1023. Westborough owed $612,000 for surface improvements to the land. *See id.*

On March 18, 1979, Westborough's competition entered the scene. The West Park Mall developers announced their plans to develop a shopping mall in Cape Girardeau. *Id.* Cape Girardeau, however, could support only one regional mall. *Id.* The West Park developers were well financed and were experienced developers. *Id.* at 1024. They had tentative commitments from two well known anchor stores. *Id.* at 1023-24. On March 21, 1979, the City approved the West Park developers' application for zoning of their property to allow development of a mall. *Id.* at 1024. The zoning became effective April 4, 1979. *Id.* The next day, Westborough filed a lawsuit in state court alleging the West Park zoning damaged Westborough's property and zoned uses. *Id.*

On April 6, 1979, the city manager publicly announced he believed Westborough's zoning had reverted to its earlier classification. *Id.* Westborough, however, knew its property was exempt from zoning reversion. *Id.* Westborough told the press the property still retained its mall zoning designation and assured their partners they need not worry about the announcement. *Id.* Westborough did nothing other than filing lawsuits to notify the City or city manager that Westborough still had its mall zoning designation. *Id.* On September 17, 1980, the city council passed an ordinance confirming what

Westborough had known all along — Westborough's property had been specifically exempted from the application of the automatic reverter provision, the City had never revoked Westborough's mall zoning, the property's mall zoning had never reverted to its earlier classification, and thus, Westborough's property was still zoned for development of a mall. *See id.*

Westborough asserts the city manager's actions damaged them in two ways: the value of Westborough's leasehold interest in the land was reduced, and Westborough lost investment opportunities because Westborough was unable to sell its leasehold interest in the land. The district court found Westborough failed to show by a preponderance of evidence that the city manager's actions damaged them in either of the two ways. *Id.* at 1024-25. We review the district court's finding for clear error. *Hall* v. *Gus Const. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988).

Westborough asserts the distict court committed error in finding Westborough suffered no damages as a result of the city manager's acitons because Westborough presented uncontroverted evidence of substantial damages. We disagree. The City challenged causation by cross-examining Westborough's witnesses. Westborough's financier admitted Westborough did not have a single anchor or small tenant lease commitment when Westborough's competitors announced their plans in 1979. The financier also admitted Westborough did not tell him the city manager's statement was wrong. One of Westborough's officers confirmed that when West Park announced its plans, Westborough had no anchors, no loans, no architectural plans, and no finances to proceed with their mall. She also admitted the grading contractor filed a mechanics lien for $312,000 three days before the city manager's announcement.

The City called another Westborough officer as an adverse witness. The witness testified that when the competing mall

announced its plans three weeks before the city manager's erroneous statement, Westborough had no tenants, no date to begin construction, and no money to pay its accumulated debts. The City also offered testimony and exhibits from the earlier jury trial relating to Westborough's lack of progress from 1974 to 1979, and the effect of the West Park developer's announcement on Westborough's development.

In short, the record suggests Westborough's venture was plagued with problems before the city manager made the erroneous statement. Thus, we cannot say the district court committed clear error in finding Westborough suffered no damages as a result of the city manager's actions. Accordingly, we need not consider Westborough's arguments relating to the calculation of damages. Westborough also asserts some of the district court's findings are inconsistent with the law of the case, unrelated to damages, and unsupported by substantial evidence. After reviewing the record, we conclude these assertions are without merit. Because we affirm the district court on the ground of damages, we need not decide the liability issue reserved in *Westborough III*.

Accordingly, we affirm the district court.

HEANEY, Senior Circuit Judge, dissenting.

I respectfully dissent. The majority affirms based on the district court's finding that because Westborough's venture was plagued with problems before the city manager announced that Westborough had lost its right to proceed, Westborough suffered no damage.

In my view, the district court's finding was clearly erroneous. The uncontroverted facts are that:

1. The City of Cape Girardeau can support only one regional mall.

2. There were two possible sites for development of a

regional mall: one leased by Westborough; and one controlled by West Park.

3. Westborough spent more than $1,000,000 developing its site.

4. On April 6, 1979, the city manager, with the full knowledge and acquiescence of the city council, announced publicly that Westborough's favorable zoning classification had been withdrawn and that West Park had been given the necessary zoning to construct a regional mall on its site.

5. West Park took immediate advantage of its now *exclusive* right to develop a mall by signing leases with major tenants and others and otherwise proceeding with development.

6. On September 17, 1980, seventeen months after the city manager had made his announcements, the city council recognized that it had no right to revert Westborough's favorable zoning permit and acknowledged that Westborough still retained its mall zoning designation.

By this time, however, the acknowledgement was of no value to Westborough. West Park was well under way with contruction of a regional mall in a one-mall city. As a result, the value of Westborough's property had inevitably declined. The city manager and the city council had given West Park an unfair advantage, a window of opportunity, during which prospective retailers rightly believed that they had to go with West Park or forego acquiring regional mall space in Cape Girardeau.

The district court and the majority of this panel both assert that because Westborough knew the city could not revert its favorable zoning permit, it should be denied relief. I could not disagree more with this argument. Westborough did the most effective thing; it commenced a lawsuit against the city and others.

Allegations have been made in this case that the city manager conspired with West Park to give West Park an ad-

vantage in its competition with Westborough. Whether this is true or not is irrelevant to this action because the city, through the city manager and the city council, illegally revoked Westborough's favorable zoning permit and immediately allowed its competition to proceed. Westborough's knowledge of the city's illegal act is not relevant. West Park was able to go to prospective lessees and say, "we are now your only alternative." If Westborough's zoning permit had not been declared reverted by the city manager and the city council, West Park might still have won the competition, but this is not what happened. West Park was given an unfair advantage, and the city should be required to compensate Westborough for its losses.

To be sure the district court could have taken into account Westborough's inability to get its project off the ground for several years in determining damages. The court should have considered, however, that the proximity and availability for development of the nearby West Park property made it difficult for Westborough to receive firm commitments from retailers.

Had this case not been before us on several prior occasions, I would remand to the district court with directions to it to determine damages, but enough is enough. I would direct entry of the following damage award:

The before value of Westborough's long-term lease	$4,050,000
Less: Lease cost development	760,000
	3,290,000
Less: After value of long-term lease (sum received for property when sold)	2,300,000
	990,000
Plus Westborough's short-term loss	385,000
Amount of Award	$1,375,000

I would also award attorney's fees and post-judgment interest, but would deny pre-judgment interest because the amount of the award could not be determined before judgment. Accordingly, I dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1766/91-1585EM

Westborough Mall, Inc. et al.,
Appellants,

vs.

City of Cape Girardeau, Missouri, et al.,
Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

February 6, 1992

Order entered at the Direction of the Court:
/s/ MICHAEL E. GENS
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX G

UNITED STATES CONSTITUTION
FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.